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DECISIONS ADVERSE TO A HOUSEHOLD

Protecting Social Housing Tenants under the *Social Housing Reform Act* and the *Tenant Protection Act*

TOBY YOUNG AND BRUCE BEST*

RÉSUMÉ

Au moment de son élection en juin 1995, le Parti conservateur de l'Ontario proposait une plate-forme électorale qui comprenait l'abandon du programme relatif aux logements. Il a tenu cette promesse et le logement social est maintenant administré, en majeure partie, par les gouvernements municipaux plutôt que par la province.

Les changements subis par le logement social sont toutefois plus significatifs que ceux simplement causés par une nouvelle administration. En plus de celle-ci, la province a ratifié de nouvelles réglementations pour codifier l'ancienne politique qui déterminait le fonctionnement du logement social dans la province. La *Loi de 2000 sur la réforme du logement social* et ses neuf règlements annexés ont mis en place une structure dont les effets sur les locataires de logement social seront significatifs, en particulier sur ceux qui bénéficient du loyer indexé sur le revenu.

L'article analyse les nouvelles règles qui s'appliquent au logement social, plus particulièrement ce qu'il advient lorsqu'un propriétaire prend une « décision défavorable à un ménage ». De telles décisions impliquent généralement la réduction ou l'annulation d'une subvention et entraînent souvent des demandes d'expulsion devant le Tribunal du logement de l'Ontario (TLO). L'un des problèmes clés de la procédure actuelle est l'absence du droit formel de révision indépendante d'une décision qui annule la subvention. Les protections de procédure, selon la *Loi de 2000 sur la réforme du logement social*, se limitent au droit de commenter et à une procédure de révision interne. De plus, le TLO adopte généralement la position où il n'a aucune juridiction pour confirmer une décision du propriétaire d'un logement social d'annuler une subvention, et il consent couramment à des demandes d'expulsion sans évaluer si la décision du propriétaire était justifiée.

L'essai, qui se base sur plusieurs cas récents devant le TLO et d'autres tribunaux, était l'argumentation que, malgré une répugnance généralisée de la part du Tribunal de s'imposer dans les litiges relatifs au loyer indexé sur le revenu, son droit de le faire existe bel et bien. Ainsi, le TLO devrait consulter la *Loi de 2000 sur la réforme du logement social* et ses règlements avant de prononcer un jugement sur les arriérés et

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l'expulsion. L'essai offre en conclusion une brève discussion sur les solutions de rechange pour résoudre des litiges relatifs à l'admissibilité au loyer indexé sur le revenu.

I. INTRODUCTION

In June 1995, the Ontario Conservative Party was elected on a platform that included getting the provincial government out of the housing business. Two weeks after taking office the government announced a moratorium on the development of non-profit housing, and on July 25, 1995 announced the cancellation of funding for non-profit projects.¹ In January 1997, the province announced major reforms, known as local services realignment, to the provincial-municipal relationship and the way public services were to be delivered in the province. Social housing² reforms were proposed as part of this broader initiative.³ In January 1998, the government transferred financial responsibility for social housing to municipalities and, that same year, established the Social Housing Committee to recommend changes to social housing programs prior to their transfer to municipal control. In November 1999, Ontario signed a new social housing agreement with the federal government that enabled federal social housing to be administered by the province. On October 12, 2000, then Ontario Municipal Affairs and Housing Minister Tony Clement introduced the *Social Housing Reform Act, 2000 (SHRA)* in the legislature. The *SHRA* was proclaimed in force on December 13, 2000⁴ as the government's attempt to improve the administration of housing programs in the province⁵ by transferring responsibility for social housing administration to municipal control.⁶

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1. Ontario Premier's Office, News Release, "Premier Announces Moratorium on Non-Profit Housing" (28 June 1995); Ministry of Municipal Affairs and Housing, News Release, "Funding for Non-Profit Housing Projects Cancelled" (25 July 1995).
 2. As of October 2000, the social housing portfolio consisted of 84,000 units of public housing, owned by the Ontario Housing Corporation, operated by local housing authorities; 156,000 units owned by non-profit corporations (municipal, private, or co-operative) and operated under agreements with the province or the federal government; and 21,000 tenants in privately owned buildings assisted through rent-supplement contracts with landlords (Ministry of Municipal Affairs and Housing, *Guide to Social Housing Reform* (Toronto: Ministry of Municipal Affairs and Housing, 2000)).
 3. These reforms, frequently referred to as the *download*, were subject to considerable opposition from social housing providers, the Association of Municipalities of Ontario, many municipal leaders, and even business groups such as the Toronto Board of Trade. Municipal governments feared housing being placed on the over-burdened municipal tax base (Co-operative Housing Federation of Canada, *Social Housing Reform Act Guide for Co-op Members* (Toronto: Cooperative Housing Federation of Canada, 2000)).
 4. Other than Parts VII (transfer payments to municipalities) and s. 178 (repeal of *Social Housing Funding Act, 1997*, S.O. 1997, c. 30, Sch. F), both of which were proclaimed in force January 1, 2001, and Part VIII (establishing the Social Housing Services Corporation) which was proclaimed in force on January 23, 2002.
 5. The purpose of the *SHRA* is "to provide for the efficient and effective administration of housing programs by service managers": *Social Housing Reform Act*, S.O. 2000, c. 27, s. 1.
 6. Under the *SHRA*, the province transferred responsibility for the administration of all social housing from one provincial administrator to 47 Consolidated Municipal Service Managers (CMSMs). CMSMs are delivery agents designated to manage Ontario Works, child care and social housing. They encompass

The social housing transfer took place in two stages. In the first stage, implemented in January 2001, the province transferred the ownership and administration of the public housing stock to the municipal level, including rent-supplement programs administered by the Ontario Housing Corporation (OHC) and Local Housing Authorities (LHAs). The former LHAs were replaced by municipally owned Local Housing Corporations⁷ (LHCs). The LHCs sat on a new provincial body, the Social Housing Services Corporation,⁸ which took on some of the duties that were formerly the responsibility of the OHC. The OHC continued to exist in a reduced capacity, primarily as the funding agency for transfers from the province to municipalities. In the second stage, commencing in October 2001, the province and municipalities developed implementation plans for the transfer of the responsibility of administering other provincial and federal programs, including provincial and non profit co-op housing.⁹ On May 1, 2002, the second and final stage of the social housing business transfer became effective, as the last of the province's social housing portfolio devolved to municipal control.¹⁰

For the first time,¹¹ the *SHRA* and the supporting regulations set out in detail the provincial rules and procedures governing social housing applications, eligibility, occupancy standards, waiting lists, priority rules, calculation of rent-geared-to-income (RGI) assistance and the procedures for decisions, internal reviews and notices. In particular, Ontario Regulation 298/01 (O.Reg. 298/01)¹² provides service managers¹³ with the authority to administer RGI assistance.

36 municipalities in southern Ontario, 10 District Social Services Administration Boards (DSSABs) in Northern Ontario and the City of Greater Sudbury.

7. The transfer created 47 LHCs (*Service Manager Update*: Ministry of Municipal Affairs and Housing, May 2002).
8. The Social Housing Services Corporation (SHSC) is comprised of board members, service managers, and housing providers, including local housing corporations and the province. Its purpose is to address some social housing functions (such as group insurance, pooling of replacement reserves, and bulk purchasing) on a province-wide basis.
9. The federal program co-ops in Ontario, administered by the Canada Housing and Mortgage Corporation (CHMC), were not affected by the transfer. The second stage transfer involved the termination of all operating agreements between the province and non-profit housing providers except agreements to which CHMC are a party (the CHMC programs are the pre-1986 private non-profit and municipal non-profit housing programs and Urban Native housing) and those being transferred to the Ministry of Health and Long-Term Care and the Ministry of Community and Social Services.
10. According to Lynn M. MacDonald, Assistant Deputy Minister, Social Housing Business Division, the transfer was "...by far the largest and most complex intra-jurisdictional transfer in the province's history." (*Service Manager Update*: Ministry of Housing and Municipal Affairs; May 2002).
11. Prior to the *SHRA*, LHA's based their decisions on policies and procedures set out in the Local Housing Authority Administration Manual, and private non-profits on similar provincial policy manuals.
12. O.Reg. 298/01, Rent-Geared-to-Income Assistance and Special Needs Housing, came into effect on July 1, 2001.
13. The term *service manager* is shorthand for CMSM, *supra* note 6.

This paper's focus is on RGI assistance. Specifically, the focus is on the procedure for the termination and variation of RGI assistance by service managers and social housing landlords through the application of O.Reg.298/01. The paper has four main purposes:

- 1) To review the decision making legislative framework in the *SHRA* and the regulations¹⁴ when a decision is made that is "adverse to a household"¹⁵ which may be internally reviewed;
- 2) To examine rent changes (primarily rent increases) in RGI rent payable, including
 - (i) increases due to a review of RGI eligibility;
 - (ii) rent changes due to reviews of the amount of RGI rent payable;
 - (iii) rent increases under Part VI of the *SHRA*;¹⁶ and
 - (iv) rent increases based on recovery of overpayments of RGI assistance;
- 3) To examine the relationship of the *SHRA* and the *Tenant Protection Act (TPA)* by reviewing the Ontario Rental Housing Tribunal (Tribunal) case law with respect to applications for arrears or rent and eviction based on increases to market rent following revocation of rent subsidies;¹⁷ and
- 4) To outline the argument that the Tribunal possesses the jurisdiction under the *TPA* to determine the issue of the termination and/or variation of rent subsidies in landlord's arrears of rent applications.

The paper concludes with a proposal for an express right of appeal to an independent tribunal from a decision terminating or varying RGI assistance. While it is argued that the Tribunal currently has the requisite jurisdiction under the *TPA* to address the issue, it is worth considering that the Social Benefits Tribunal may be the better forum for the resolution of disputes relating to rent subsidies.

14. The review does not include local eligibility rules that may be developed and adopted by a service manager under s. 75(5) of the *SHRA*. A complete review of the decision-making process would need to be supplemented with the any applicable local rules. For example, under s. 13 of O.Reg. 298/01, a service manager may establish a local eligibility rule relating to absence from a RGI unit. By April 2003, many municipalities had implemented such local rules – the City of Kingston implemented a 90-day rule and the City of Toronto a 120-day rule. Other local rules include an extension of the time for a household to provide information under O.Reg. 298, s. 10(1)(a). In general, this has been extended to 30 or 31 days.

15. *SHRA*, s. 80.

16. Specifically, the requirements for leases and occupancy agreements concerning the procedure for raising the rent.

17. In this paper the terms *rent subsidy* and *RGI assistance* are used interchangeably. The term *rent subsidy* is not used in the *SHRA*. The defined term is *RGI assistance* which is "financial assistance provided in respect of a household under a housing program to reduce the amount the household must otherwise pay to occupy a unit in a housing project": *SHRA*, s. 2.

II. DECISION-MAKING FRAMEWORK

The *SHRA* requires that a service manager, supportive housing provider¹⁸ or lead agency,¹⁹ as the case may be, comply with a three stage process when making a decision that may be internally reviewed under s. 82. A household²⁰ must be (1) given notice of opportunity to comment on a proposed decision, (2) notice of the decision itself, and (3) the opportunity to request an internal review of the decision.

A. *Opportunity to Comment on Proposed Decisions*

1. Proposed Decision & Opportunity to Comment

If information is obtained from a third party, s. 80 of the *SHRA* requires that the decision maker provide a household with an opportunity to comment on any such information that may, in the opinion of the decision maker, form a significant basis for a decision. The opportunity to comment on information is to be provided before the decision is finalized. It is important to note that if the information on which a decision is to be made is provided directly by the household within 30 days prior to the decision, there is no right to comment.²¹

The decisions attracting the opportunity to comment are those decisions that also give a right to request an internal review. There are six such decisions:²²

- that the household is ineligible for RGI assistance;
- that the household is ineligible for special needs housing;
- respecting the type of accommodation in which the household may be accommodated;

18. A *supportive housing provider* is a housing provider providing special needs housing in a housing project operated by it. It is likely that a supportive housing provider is a housing provider that operates a housing project that contains special needs housing in addition to regular RGI housing. *Special needs housing* is a unit that is occupied by or is made available for occupancy by a household having one or more individuals who require accessibility modifications or provincially funded support services in order to live independently in the community. In addition, a housing provider is a person who operates a housing project and a *housing project* means all or part of the residential accommodation, including facilities used for ancillary purposes, located in one or more buildings used in whole or in part for residential accommodation: *SHRA*, s. 2.

19. A *lead agency* is a lead agency designated under s. 88. Section 88 provides that the Lieutenant Governor in Council may designate one or more persons to act as a lead agency within the service area of a service manager for the purpose of administering access to special needs housing.

20. A *household* is defined as an “individual who lives alone or two or more individuals who live together”: *SHRA*, s. 2.

21. Under s. 55(1.1) of O.Reg. 298/01, housing providers are not required to give a member of a household an opportunity to comment on information that the member provides unless the housing provider makes the adverse decision more than 30 days after receiving the information from the member of the household. In most cases, therefore, only information received from a third party would require the thirty day opportunity to comment period as, for example, where evidence is received that a member of the household is working and the household has failed to disclose the additional income.

22. *SHRA*, s. 82.

- respecting the category into which the household has been placed on a waiting list;
- respecting the amount of RGI rent payable by the household; and
- respecting a deferral of RGI rent payable by the household.

2. Notice of Opportunity to Comment

Where the opportunity to comment exists, the service manager, supportive housing provider or lead agency, as the case may be, must give the household notice of that opportunity in accordance with s. 55 of O.Reg. 298/01. The notice must contain:²³

- a summary of the information that may form a significant basis for the decision;
- a description of the proposed decision;
- a statement that any member of the household may comment on the information; and
- a date at least 30 days after the date the notice is given that will be the last date comments may be received.²⁴

3. Comments

The household's comments must be in writing and must be signed by the individual providing comments.²⁵ Comments must be received on or before the date that is given as the last date comments may be received unless all members of the household submit written waivers of their right to comment to the service manager, in which case comments must be received before the last of the waivers is received.²⁶ It is noteworthy that O.Reg. 298/01 does not explicitly state how any comments received from the household regarding the information should be considered. However, it follows that if the information from the third party is not accurate or complete, the social housing landlord should reconsider its proposed decision in light of the "new" information provided by the household. Finally, once the opportunity to comment has been given, the household is not entitled to an additional opportunity to comment even if the decision that is made is different from the proposed decision.²⁷

B. Formal Decision

1. Notice of Decision

Once the comment period has passed, the decision maker will then make the formal decision. Decisions affecting eligibility for assistance are made under Part V of the *SHRA*. Sections 65 to 70 set out the rules for eligibility for RGI assistance, and ss. 71

23. O.Reg. 298/01, s. 55(3).

24. Unless the household waives their right to comment prior to the date: O.Reg. 298/01, s. 55(3)4.

25. O.Reg. 298/01 s. 55(5).

26. O.Reg. 298/01, s. 55(6).

27. O.Reg. 298/01, s. 55(8).

to 74 set out the rules for eligibility for special needs housing. The *SHRA* provides that decisions under ss. 66, 67, 68, 69, and 70 are to be made only by service managers. In contrast, decisions under ss. 72, 73, or 74 may be made by service managers, supportive housing providers, or a lead agency, as the case may be.

Section 16 of the *SHRA*, however, allows service managers to delegate their decision-making powers to any “...person to perform some or all of the duties or exercise all or some of the powers of the service manager under this Act with respect to all or part of the service manager’s service area”. Subsection 16(9) states that the person to whom the powers are delegated is deemed to be acting on behalf of the service manager and decisions made by the person are deemed to be decisions of the service manager. Thus, where delegated, a supportive housing provider or lead agency may make a decision under ss. 66 to 70 and these decisions are deemed decisions of the service manager.²⁸

2. Notice of Decisions That May be Reviewed

Decisions respecting eligibility for RGI assistance²⁹ require that written notice be provided.³⁰ The following are the specific subsections of the *SHRA* under which a decision affecting eligibility for RGI assistance will be made and for which a household has a right of internal review:³¹

- ss. 66(1) & (2) – eligibility for assistance (initial and ongoing decisions);
- ss. 67(1) & (2) – type of accommodation (initial and ongoing decisions);
- s. 68(1) – category within waiting list (initial);
- s. 68(6) – whether included on waiting list;
- s. 69(1) – amount of RGI assistance; and
- s. 70(3) – deferral of payment of all or part of rent.

The notice of decision for all of the above decisions must contain:³²

- a statement of the date the decision to which the notice relates was made;
- if the opportunity to comment was given under s.80 of the *SHRA*:
 1. a statement of the date that the notice of opportunity to comment was given;
 2. a statement of the date before which any comments must have been received;

28. It is very important to know, therefore, when determining who has the authority to make a particular decision, if there is such an agreement in place in the particular service area between the service manager and the housing provider or lead agency.

29. Written notice is also required for special needs housing as well: O.Reg. 298/01, ss. 71(1),(2), 73(1), 74(1), 74(3).

30. Section 56 of O. Reg. 298/01 sets out the restrictions and requirements for written notices.

31. O.Reg. 298/01, s. 56(1).

32. O.Reg. 298/01, s. 56(2).

3. a statement of which members of the household provided comments; and
- if the member of the household may request an internal review of the decision under s. 82 of the *SHRA*:³³
 1. a statement of the reasons for the decision;
 2. a statement that the member of the household is entitled to request an internal review; and
 3. information on how to request a review and the deadline for doing so.

The decisions for which an internal review is available under s.82 of the *SHRA* and the decisions for which written notice is required under s. 56(1) of O.Reg. 298/01 are not, as might be anticipated, identical. A notice of decision under s.56 of O.Reg. 298/01 must always include information regarding the opportunity to comment³⁴ and the right to request an internal review, unless it is a decision about being placed on a waiting list.³⁵ Finally, the notice of decision must be given within seven business days after the decision is made.³⁶

C. Internal Review

1. Requests for Internal Review

Section 57 of O.Reg. 298/01 sets out the requirements relating to requests for internal reviews:³⁷

- a request must be in writing;
- a request must be given to the party that made the decision;
- a request by a member of a household must be received within 10 business days after the day the decision is received by the member of the household;³⁸

33. If no member of the household may request an internal review, the notice shall contain a statement that the decision is final and an internal review may not be requested: O.Reg. 298/01, s. 56(2)4.

34. Subject to the third party information limitation and the 30-day rule for household members, *supra* note 21.

35. Subsection 68(4) of the *SHRA*, concerning RGI assistance, provides that a service manager shall determine what category within which waiting list the household will be included. Subsection 68(6) provides that the service manager shall give notice to a household about whether the household is to be included in a waiting list and in what category. Subsection 74(5), concerning special needs housing, provides that a service manager shall give notice of the decision about whether the household is included on a waiting list and what category the household is listed in. However, s. 82(1)4 of the *SHRA* provides that a decision respecting the category into which the household has been placed on a waiting list is a decision that may be internally reviewed but makes no reference to being included in the waiting list in the first place. This is likely the case because s. 37 and s. 45(2) of O.Reg. 298/01 state that a household is only added to a waiting list if the service manager determines that the household is eligible for RGI assistance or special needs housing, as the case may be. Thus, no household would be added to a waiting list independently of a decision about initial eligibility and initial eligibility decisions are subject to internal review.

36. O.Reg. 298/01, s. 56(3).

37. O.Reg. 298/01, ss. 57(1)-(8).

38. An extension of time to consider an internal review may be granted if the decision maker is satisfied

- a request for review of decision about inclusion in special priority household or of decision about eligibility for RGI assistance (which includes a request for inclusion in a special priority household) may only be made by the individual who made the initial request for inclusion; and
- a request for review may be withdrawn by giving written notice but the withdrawal is not effective if received after the review is completed.³⁹

2. Conduct of Internal Review

The *Statutory Powers Procedure Act (SPPA)* does not apply to internal reviews.⁴⁰ Section 58 of O.Reg. 298/01 provides that:

- no individual who participated in the making of the decision being reviewed can participate in the review of that decision,⁴¹ and the individual or individuals conducting the review may substitute their decision for the decision being reviewed;⁴²
- a review is to be completed within 10 business days after the request for the review is received;⁴³
- a review is to be completed within five business days after the request is received if:
 1. The decision is with respect to a request for inclusion in the special priority household category; or
 2. The decision is with respect to an application for RGI assistance with which a request for inclusion in the special priority household category was made; and

that the member of the household acted in good faith and was unable to comply with the 10 day period because of absence, accident, illness, or some other reason beyond the person's control: O.Reg. 298/01, s. 57(5).

39. If a tenant doesn't like the internal review decision he or she can't change his or her mind about having the review.

40. *SHRA*, s. 83(2).

41. Though the responsibility for conducting internal reviews belongs to the service manager, in practice this responsibility will likely be delegated under s. 16 of the *SHRA* to the local housing corporation, *i.e.* the largest public housing landlord. This is currently the case, at least for internal reviews of decisions regarding placement on a waiting list in Toronto: *Social Housing Waiting List: Internal Review Process*, Toronto Staff Report, May 22, 2003 at 3.

42. O.Reg. 298/01, ss. 58(2), (5).

43. O.Reg. 298/01, s. 58(3). Some social housing providers have expressed concern over the timelines for internal reviews. The Ontario Non-Profit Housing Association (ONPHA) has stated:

The problem is that for some kinds of disputes, the timeframe may allow for little more than a review of the paperwork in the case, not a proper hearing with the appellant. In many cases, where an actual hearing is appropriate, the timelines are not sufficient. ONPHA recommends that the regulation should allow the development of review processes that would grant additional time where this would better resolve the dispute: (*ONPHA Member Action: Amending the SHRA Regulations*, July 2002 at 8).

- individuals conducting the review decision with respect to special priority households may also substitute their decision for the initial decision and written notice of the result of the review is to be given to requesters within five business days after the review is completed.⁴⁴

3. Finality of Internal Review Decisions

Section 84 of the *SHRA* provides that:

- a decision that is reviewable is final when the time for requesting the internal review expires if no internal review is requested within that period; and
- a decision of a person conducting an internal review is final when it is made.⁴⁵

Most notably, the *SHRA*, unlike the *Ontario Works Act (OWA)* or the *Ontario Disability Support Program Act (ODSPA)*, does not expressly provide for a statutory right of appeal to an independent tribunal from internal review decisions.⁴⁶ The only direct legal challenge to a decision on internal review may be by way of an application for judicial review.⁴⁷ However, as is discussed below,⁴⁸ the forum where the landlord's decision to revoke or vary RGI assistance is most likely to be raised is at the Tribunal upon the social housing provider commencing an eviction application resulting from termination of a rent subsidy.

III. CHANGES IN RENT IN RGI HOUSING

There are different time periods and different procedures prescribed for rent increases, depending on the circumstances in which the rent is being increased. In order to determine whether a proposed rent increase is legal, one must look, in most cases, to both the *SHRA* and the *TPA* to discern the amount of rent increase allowable and what notice period may apply before the rent increase may be taken. Under the *SHRA*, there are two main types of rent increases:

- A. rent increases due to a change in the financial situation of the RGI household; and
- B. rent increases due to a household becoming ineligible to receive RGI assistance.

A. Change in RGI Household Income

In RGI housing by definition when the financial situation of the household changes so does the RGI rent payable. The *SHRA* and regulations provide two separate yet similar procedures for adjusting the rent payable based on a change in the income or

44. O.Reg. 298/01, ss. 58(4),(5),(6).

45. *SHRA*, ss. 84(3),(4).

46. Under those two enactments, the right of appeal from the internal review decision is to the Social Benefits Tribunal.

47. For example, a judicial review decision of the landlord's decision to revoke RGI assistance. The leading case on the requirements of procedural fairness in the context of eviction from social housing is *Re Webb and Ontario Housing Corporation*, *infra* note 171.

48. *Infra*, Part IV, The Tribunal's Approach to Arrears of Rent Applications based on Termination of Rent Subsidies.

asset level of the household: (i) the periodic (annual) review and (ii) the nonperiodic (“spot-check”) review.

1. Periodic Review

The *SHRA* and O.Reg. 298/01 provide for an annual review process of decisions respecting the amount of RGI rent payable by the household. Under s. 52, a service manager is required to review the amount of RGI rent payable at least once every 12 months and shall determine whether the rent payable shall be reduced, increased or remain the same.⁴⁹

a) Implementation

If a service manager determines after a review that the RGI rent payable should be increased or decreased, the service manager must give the household written notice of its decision.⁵⁰ These decisions attract the right to comment⁵¹ and are subject to internal review. The content requirements of the notice are set out in s. 56 of O.Reg. 298/01. If the service manager determines that the rent should be reduced, the rent reduction takes effect on the first day of the month following the month in which the written notice is given under s. 69(3).⁵² If the service manager determines that the rent should be increased, the rent increase takes place on the first day of the second month following the month in which written notice is given under s. 69(3).⁵³

b) Internal review

Presumably, except in most cases where the change was due to a change in the households financial circumstances (*i.e.*, there was an increase in the household income), a household may wish to challenge most RGI rent increases, and any rent reduction where they are of the opinion the reduction was not sufficient. A household may request an internal review of the decision to reduce or increase the RGI rent payable.⁵⁴

2. Nonperiodic Review

Section 10 of O.Reg. 298/01 sets out a household’s continuing obligation to provide within 10 business days⁵⁵ written notice setting out any change in information or a

49. O.Reg. 298/01, ss. 52(1),(2).

50. *SHRA*, s. 69(3).

51. Subject to the comments, *supra* note 21. If the opportunity to comment exists, then only after the opportunity to comment was completed may the service manager give a notice of decision under s. 69(3) of the *SHRA* to either reduce or increase the rent.

52. O.Reg. 298/01, s. 52(7).

53. O.Reg. 298/01, s. 52(8).

54. *SHRA*, s. 82(1)5.

55. Or within such longer period as the service manager may allow: s. 10(1). This has been interpreted by most municipalities as allowing them to extend the 10-day period across the board to a longer period, generally 30 days. The equally possible interpretation that this section was intended to allow case-by-case discretion to accept documents provided late has not, to our knowledge, been adopted by any municipalities. ONPHA has itself suggested that this rule allows for no flexibility to housing providers. Even where a household has a legitimate reason for missing the deadline (whether it is 10 or 30 days), or where the housing provider proposes an alternative to loss of RGI, under the current

document, and in the case of a change in a document, provide the changed document to the service manager.⁵⁶ The notice is to be in the form and manner required by the service manager. If a household notifies a service manager of a change in income (or assets) of the household, the service manager must recalculate the RGI rent payable by the household.⁵⁷

a) Implementation

As with periodic reviews, if the service manager determines that the rent is to be reduced, the rent reduction takes effect on the first day of the month following the month in which the change occurred.⁵⁸ If the rent is increased, the rent increase takes effect on the first day of the second month following the month in which the change occurred.⁵⁹

b) Internal Review

The effective date of rent changes in a nonperiodic internal review mirror the changes as a result of a periodic review. If an internal review is requested of a decision to increase the rent and the service manager confirms the rent increase, the increase takes effect on the later of the first day of the first month after notice of the internal review decision is given and the first day of the second month after the month in which the change occurred.⁶⁰ If the internal review results in a decrease, the effective date is the first day of the first month after notice of the internal review decision is given.

B. Review of Household's Eligibility for RGI Assistance

The procedures for adjusting the amount of RGI rent payable by a household are not necessarily a penalty for the household. They may be valid adjustments to reflect the fact that a member of the household has started working or has otherwise experienced a change in household income that affects the level of RGI assistance to which the household is entitled, much as would happen with eligibility for social assistance. The decisions are made once the relevant information has been provided to the landlord. As in social assistance cases, a social housing landlord can terminate a household's rent subsidy if it is determined that they no longer meet the eligibility criteria set out

interpretation there would be no discretion – if the tenant provides information after the 30 days, they cease to be eligible for a subsidy, and no one has any ability to change this. ONPHA recommends that service managers should be permitted to make a retroactive rent increase, where justified, and, further, recommends that households be provided with 25 business days for reporting changes that would result in a rent charge of more than \$10.00 and changes in household size (ONPHA, *Member Action* (July 2002) at 3). A better solution would be for service managers to delegate the discretion to accept documents late to the housing providers.

56. The changed document is provided within the period of time specified by the service manager: O.Reg. 298/01, s. 10(1)(b). Prior to the SHRA, many standard social housing leases contained a clause that the tenant was to provide written notice of any changes in the tenant's income or household composition in the month in which the change occurred.

57. O.Reg. 298/01, s. 53(1).

58. O.Reg. 298/01, s. 53(2).

59. O.Reg. 298/01, s. 53(3).

60. O.Reg. 298/01, ss. 53(5)-(9).

in the *SHRA* and regulations. Such decisions are not necessarily accompanied by a corresponding ability to pay a dramatically increased rent.

It is important to note that the implication of ceasing to be eligible for a rent subsidy does not mean the tenant has to vacate the unit; the tenant is entitled to remain in the unit and pay the market rent (subject to the “ceasing to qualify for occupancy” discussion, *infra* at note 159). There is no difficulty with this where the household’s income has increased to the point where the household is no longer eligible for a subsidy, and the decision is based on that undisputed fact. On the other hand, many decisions relating to ceasing to be eligible altogether have little or nothing to do with the tenant’s ability to pay a higher rent, but rather with the landlord’s dissatisfaction at something the tenant has done or failed to do.⁶¹ Where the tenant does not have a corresponding increase in income to pay the market rent, the cancellation of a subsidy becomes an indirect decision to evict. The tenant may remain in possession until the landlord brings eviction proceedings at the Tribunal based on arrears of market rent. Given the Tribunal’s general reluctance to delve into RGI assistance disputes, a tenant who has their subsidy terminated when their income has not increased correspondingly is not only likely lose their housing, but will generally end up with a sizeable debt as ordered by the Tribunal, particularly where the decision to cancel a subsidy is made retroactively.⁶²

As with adjustments in RGI rent payable due to changes in income, the decision maker is required to conduct annual reviews for all the criteria of eligibility for a subsidy, and may also require information of a tenant at any time. Section 11 of O.Reg. 298/01 provides that a service manager shall conduct a review of eligibility at least once every 12 months to determine whether the household continues to be eligible for RGI assistance. A household must provide such information and documents as the service manager may require within the time specified.⁶³

1. Grounds for Becoming Ineligible

Section 12 sets out the grounds by which a household may become ineligible for RGI assistance. Where a household ceases to meet the initial eligibility criteria for RGI housing or the landlord subsequently determines that they did not meet any of those criteria at some past review, the subsidy is to be terminated.⁶⁴ The eligibility criteria under s. 7(1) are:

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- 61. Most commonly, providing verification of income forms after the housing provider’s imposed deadline.
 - 62. The problems with this system are not necessarily favourable to social housing landlords either, particularly to small private non-profit housing providers whom, in order to secure ongoing funding, presumably have to demonstrate that they are enforcing the rules. It should also be noted that most of the grounds under which a tenant ceases to be eligible for a rent subsidy do not offer any direct means of evicting a tenant. Though a landlord may be criticized for revoking a subsidy and bringing an arrears application in cases where the real claim is either misrepresentation of income or ceasing to meet the qualifications for occupancy (both of which are separate grounds of eviction under the *Tenant Protection Act, 1997*, S.O. 1997, c. 24 (*TPA*)), there are cases where a landlord is obliged to cancel a subsidy, and pursue the “economic eviction”. See, for example, the case where a local rule is in place under O.Reg. 298/01, s. 13 regarding absence from the unit.
 - 63. O.Reg. 298/01, ss. 11(1)–(3).
 - 64. O.Reg. 298 /01, ss. 7(1), 12(1)(a),(b).

- *age*: at least one member of the household must be 16 (and able to live independently);⁶⁵
- *immigration status*: tenants must be Canadian citizens, permanent residents or refugee claimants, and there must be no deportation, departure or exclusion order against any member of the household;⁶⁶
- *arrears status*: the household must not owe any arrears of rent, or “arrears” for damage to a unit, to a social housing landlord, unless there are extenuating circumstances or they have entered into an agreement to repay, and the landlord is satisfied they are making efforts to satisfy the agreement. In the case of a special priority household, the tenant need only have entered into an agreement to pay one half the arrears, if the victim of abuse was a joint tenant with the abusive party when the arrears arose;⁶⁷ and
- *housing fraud*: no member of the household can have been convicted of defrauding a social housing landlord, nor have been found by the Tribunal to have misrepresented their income, unless they had previously applied and been found not eligible on that ground. Furthermore, if any member of the household had been a member of another household where one of the members was convicted or found to have misrepresented their income, that the current household members either did not know of the fraud or were not able to prevent it.⁶⁸

In addition, a household will become ineligible for not making reasonable efforts in pursuing an available income source, including family support, Ontario Works, Employment Insurance, Old Age Pension, and sponsorship support under the *Immigration Act*.⁶⁹ They will also cease to be eligible if they currently, or at a past eligibility review, do not or did not meet a local eligibility rule.⁷⁰ Experience with similar provisions in social assistance matters would predict that ss. 12(1)(f), (h), (i), and (l), providing that a household ceases to be eligible for RGI assistance if the household fails or failed to provide information or documents relevant to eligibility for RGI assistance, in accordance with s. 5,⁷¹ 10,⁷² 11,⁷³ or 52⁷⁴ will present the most difficult cases.⁷⁵

65. O.Reg. 298/01, s. 7(1)(a).

66. O.Reg. 298/01, ss. 7(1)(b),(c),(d).

67. O.Reg. 298/01, ss. 7(1)(e),(f).

68. O.Reg. 298/01, ss. 7(1)(g),(h).

69. O.Reg. 298 /01, ss. 7(3)–(5), 12(1)(c).

70. O.Reg. 298 /01, ss. 12(1)(d),(e).

71. Obligation to report changes relevant to RGI eligibility *before* the household begins to receive RGI assistance: O.Reg. 298/01, s. 5(5).

72. Obligation to report changes relevant to RGI eligibility: O.Reg. 298/01, s. 10(1).

73. Annual review of RGI eligibility: O.Reg. 298/01, s. 11(3).

74. Annual review of amount of RGI assistance: O.Reg. 298/01, s. 52(3).

75. For example, O.Reg. 134/98, s. 14(1), made under the *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A provides that income assistance is to be stopped if a recipient fails to provide the information required to establish eligibility. A common element in disputes under this section is that it is not

2. Consequences of becoming ineligible

Section 14 sets out the consequences of ineligibility. For example, where RGI assistance is revoked as a result of an annual or ongoing review of eligibility under s. 10 or s. 11, the service manager is to cease paying the RGI assistance as of the month immediately following the 90th day after the service manager gives the household written notice under s. 66(5) of the *SHRA* of the decision that the household has ceased to be eligible for RGI assistance.⁷⁶

The household is to commence paying the market rent beginning with the month following the 90 day notice.⁷⁷ If the household requests an internal review and the decision is reversed then no rent increase to the market rent will occur.⁷⁸ Additionally, s. 22(6) of O.Reg. 339/01⁷⁹ provides that a housing provider shall give notice of a rent increase to a household if the rent increase is required for a reason other than a change in the household's financial circumstances,⁸⁰ and

1. if the housing provider is subject to the *TPA*, the notice of rent increase shall be in accordance with the *TPA*;
2. if the housing provider is not subject to the *TPA*, the notice of rent increase shall be 60 days.

The latter rule would apply to members of nonprofit cooperatives subject to the *SHRA*.⁸¹

C. Recovery of Overpayment

Under s. 86 of the *SHRA*, if a household has paid RGI rent at a lower rate than the rate to which the household is entitled, the service manager may request that the household reimburse the excess amount of RGI assistance paid to the household. The service

always clear exactly what information was not provided.

76. O.Reg. 298/01, s. 14(3).

77. For example, a household receives, on April 30, notice that they are ineligible due to a failure to report income. The service manager provides notice of an increase (in accordance with *TPA*, s. 127(1), if the increase is for a reason other than a change in the household income) to market rent at the same time, to take effect August 1.

78. O.Reg. 298/01, s. 14(2).

79. O.Reg. 339/01 is entitled "Housing Projects Subject to Part VI of the Act" and came into effect in August, 2001. Section 21 of O.Reg. 339/01 provides that every lease or occupancy agreement shall provide that the amount of RGI rent is subject to change if (1) there are household financial changes that affect the RGI rent payable or (2) the household is no longer eligible for RGI assistance: s. 21(1)4.

80. A rent increase required for a reason *other* than a change in the household's financial circumstances is presumably a rent increase required due to becoming ineligible for RGI assistance.

81. For non-profit co-operative housing providers, the notice period for increasing the rent for a reason other than an increase in the household's income is at least 60 days. For non-profit co-operative housing *member units* the notice period is 60 days because the *TPA* does not apply to member units: *TPA*, s. 3(c). If the rent increase is due to a change in income then the *SHRA* applies.

manager may collect the amount owing by increasing the amount of RGI rent payable by the household⁸² or by any other means available at law.⁸³

Section 86 is designed to address situations where a service manager has determined that a household has paid less RGI rent than they should have. This may be, for example, because the household has not provided full or accurate information to the service manager, whether initially or as part of a continuing obligation, or the service manager made an error in determining the RGI rent payable by the household at some earlier date, *i.e.*, administrative error.

In the case of a service manager error, it would seem inappropriate for the service manager to seek reimbursement given that there is no fault on the part of the affected household.⁸⁴ This interpretation would be consistent with the general equitable argument that a tenant should not be made to pay for an administrative error on the part of the landlord, such as a failure to recalculate the rent where the tenant has provided all the required information.⁸⁵

Section 86 potentially provides an interesting option for service managers where tenants have failed to provide income information. The failure to provide information may be inadvertent or intentional on the part of the household. Must the subsidy always be cancelled and the RGI rent be raised to market rent where a tenant fails to provide such information? Where the service manager accepts a tenant's explanation, may the landlord exercise the option to collect whatever amounts are owed under s. 86 as opposed to terminating the rent subsidy for failure to provide information? It is

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82. If the landlord chooses to collect the excess by raising the RGI rent, the amount of the rent increase cannot exceed 10% of the RGI rent that would otherwise be payable by the household: O.Reg. 298/01, s. 54(2). This is same as the maximum rate of recovery of an overpayment in social assistance matters; see, for example *OWA*, s. 20(2) and O.Reg. 134/98, s. 62(1)(a). However, under social assistance policy, the normal rate of recovery is 5% unless there is evidence of a capacity to pay more, in which it may be increase up to 10%. Alternatively, if recovery at 5% may cause undue hardship, discretion may be exercised to reduce the level of recovery, or to not collect the overpayment at all: OW Directive 44.0, *Establishing Overpayments and Recovery*, September 2001 at 5. The notice of rent increase shall specify the amount of the increase payable and specify that the increase takes effect on the first day of the second month following the month in which the notice is given: O.Reg. 298/01, s. 54(3). Further, s. 127 (notice of rent increase) and s. 128 (deemed acceptance where no notice of termination) of the *TPA* do not apply with respect to such a rent increase: *SHRA*, s. 86(7).
 83. *SHRA*, s. 86(4). The phrase "other means available at law" is not defined in the *SHRA* but presumably includes applications under s. 69 of the *TPA* where the tenant did not pay the increase in the RGI rent. Such an application would directly raise the issue of the jurisdiction of the Tribunal to determine retroactive rent arrears under the *TPA*. Arguably, this could not be done under s. 61 or s. 86 of the *TPA* as only s. 88 permits a landlord to apply for payment of "compensation" retroactively for rent that would be owing had there not been a misrepresentation of income.
 84. This is an area where local policies may be very important in the exercise of the social housing landlord's discretion.
 85. However, at least one Tribunal decision has suggested that s. 86 may allow for the collection of retroactive arrears owing to administrative error: *Metropolitan Toronto Housing Corporation v. Pottinger* (3 August 2001; Feldman), File No. TNL-23683 (ORHT). In the end, the Tribunal found that the *SHRA* did not apply to the facts of the case.

reasonable to suggest that the service manager does indeed maintain such discretion and the mere fact that a tenant fails to provide information need not, in every case, lead to the termination of the subsidy. For instance, a tenant who has been paying \$125 rather than the \$175 that should have been paid due to a failure to provide income information, may have an explanation that satisfies the service manager that there was no intent to deceive. In such circumstances, the service manager might employ s.86 of the *SHRA* to recover the amounts owing at a relatively modest level without terminating the subsidy or filing an application to evict based on misrepresentation of income. Alternatively, in the event that the failure to provide information was intentional and deceitful, it constitutes misrepresentation of income and a landlord may recover amounts owed in an application to the Tribunal.⁸⁶ Section 86 closely mirrors the overpayment provisions under social assistance legislation,⁸⁷ which are often invoked to claim and recover an amount owing but which do not disentitle a recipient to assistance. The social assistance provisions allow the calculation of a debt and recovery through ongoing deductions from assistance.

However, it may be that many housing providers will often simply commence eviction applications to the Tribunal based on arrears of rent, rather than relying on s. 86. The eviction option will likely be selected where there is a poor relationship between the tenant and the landlord and may even be the route taken as a matter of course by some housing providers to obtain a faster repayment schedule than would be possible under s. 86. A mediated agreement at the Tribunal may well provide for repayment of the arrears over a matter of months, as opposed to years as would be the case for most s. 86 underpayments, even at the maximum rate of 10% of the rent payable. It may be that such a practice could be challenged as an attempt by a public housing provider to sidestep the recovery provisions in the *SHRA*.

IV. ARREARS OF RENT APPLICATIONS INVOLVING TERMINATION OF RENT SUBSIDIES

The consequence of a rent increase to an RGI tenant resulting from the termination⁸⁸ of a rent subsidy is often the inability of the tenant to pay their rent at the market level

86. Section 88 provides:

If a landlord has the right to give a notice of termination under s. 62(2), the landlord may apply to the Tribunal for an order for the payment of money the tenant would have been required to pay if the tenant had not misrepresented his or her income or that of other members of his or her family, so long as the application is made while the tenant is in possession of the rental unit.

87. *OWA*, s. 19; *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sch. B., s. 14.

88. To a lesser extent, a variation of a rent subsidy might also lead to an arrears of rent application. For instance, where the social housing landlord has raised the rent in accordance with s. 86 of the *SHRA* and the tenant fails to pay the increased amount. The arguments in this section would give the Tribunal the same authority to determine whether an underpayment assessed under *SHRA*, s. 86 was valid in the same way it could determine whether a cancellation was valid, much in the same way that the Social Benefits Tribunal routinely determines appeals with respect to the assessment of overpayments, as well as appeals with respect to termination of social assistance.

(or at the varied RGI level, as the case may be). A tenant is faced with the likelihood of eviction proceedings for arrears of rent under the *TPA* in the event that the dispute is not resolved by the internal review procedure under the *SHRA*.

There have been a number of conflicting decisions from the Tribunal with respect to its jurisdiction to determine the lawful rent owing,⁸⁹ if any, in arrears applications brought by social housing landlords. Most of the decisions are devoid of any substantive legal analysis of the *TPA*. Moreover, few decisions contain any specific reference to the *SHRA* as part of the determination as to whether the Tribunal has the jurisdiction to address the issue of the termination of a rent subsidy.⁹⁰ The Tribunal has, in general, taken one of three approaches when confronted with an application for arrears of rent by social housing landlords:

- A. that it has no jurisdiction to determine the circumstances behind the termination of a rent subsidy but nevertheless makes an eviction order (although relief from eviction – but not relief from the debt – may be available);
- B. that it has the jurisdiction to determine the lawful rent owing, and therefore has the jurisdiction to determine whether or not an RGI subsidy was properly terminated; or
- C. that it has no jurisdiction to determine the circumstances behind the termination of a rent subsidy and therefore also has no jurisdiction to make any order for arrears of rent or an eviction until that issue has been decided in the appropriate forum.

Several of the decisions cited below were made by the Tribunal prior to the *SHRA* being in force. However, the arguments regarding the basic jurisdiction of the Tribunal are fundamentally the same, at least with respect to the issue of the Tribunal's jurisdiction to determine the lawful rent in an RGI situation.⁹¹

A. No jurisdiction and Tribunal Orders

1. To Hear Tenant's Dispute

The Tribunal has decided in a number of applications brought after notice of termination for arrears was given under s. 61(1) that it has no jurisdiction to determine the correct calculation or amount of a rent subsidy.⁹² In *Houselink Community Homes*

89. Section 61 of the *TPA* refers to a tenant failing to pay "rent lawfully *owing* under the tenancy agreement" and s. 86 refers to a tenant who has not paid "rent lawfully *required* under the tenancy agreement".

90. An exception is *M.F. Arnsby Property Management v. Jennings* (4 June 2001; Holmes), File No: SWL-27716-RV (ORHT), where the Tribunal held that it had no jurisdiction to determine the tenant's monthly rental payment. The recourse for the tenant was to request an internal review as provided under the *SHRA*.

91. Once a decision is made that there is jurisdiction for the Tribunal to determine the correct level of subsidy, of course, the decision would be based on the appropriate regime in place at the time the decision was made.

92. *Northumberland County Housing Authority v. Hasledon* (7 July 1998; Wright) File No. EAL-05342

v. Ferreira,⁹³ an application brought after giving notice of arrears under s. 61(1), the Tribunal restricted the scope of its consideration, stating:

I advised both parties (particularly the tenant) that the administration of the subsidy was not something upon which I was inclined to adjudicate. In other words, whether the subsidy was properly removed or improperly removed, was not a matter for tribunal determination in an arrears application.⁹⁴

More recently, in *Victoria Park Community Homes v. Liszek*⁹⁵ and in *Hamilton East Kiwanis NP Inc. v. Barrowcliffe*,⁹⁶ the Tribunal summarily dismissed the notion that it might have any jurisdiction, stating that the "...Tribunal has no jurisdiction to inquire into the tenant's entitlement to a rent subsidy".⁹⁷ In the review decision in *Liszek*,⁹⁸ the Tribunal further stated:

The member determined that the "lawful" rent was that which the parties before him often referred to as the "market rent". The Tenant submits, as he did at the hearing, that the Tribunal has jurisdiction and the obligation to consider the subsidy that the Tenant receives or is entitled to receive from the social housing provider. The Tenant has not provided any law that grants the Tribunal the jurisdiction to consider the Tenant's qualification (or disqualification) or calculation of a rent subsidy. ... In my view if the Tenant has been (or feels he has been) wrongfully denied a rent subsidy then he must pursue his remedies with the subsidy provider, not this Tribunal.⁹⁹

(ORHT); *Metropolitan Toronto Housing Authority v. Hewelt* (11 August 2000; McCutcheon) File No. TSL-21020-RV (ORHT).

93. *Houselink Community Homes v. Ferreira* (26 October 1999; MacVicar) File No. TSL-12759 (ORHT).

94. *Ibid.*, Reasons at 2.

95. *Victoria Park Community Homes Inc. v. Liszek* (13 March 2002; Gregory) File No. SOL-29889 (ORHT).

96. *Hamilton East Kiwanis NP Homes Inc. v. Barrowcliffe* (20 August 2002; Gregory) File No. SOL-33679; (ORHT). Interestingly, while the Tribunal declined jurisdiction to inquire into the tenant's "entitlement to a rent subsidy", it, in effect, made a finding that the tenant had failed to file her income information as required and was therefore ineligible for RGI assistance effective July 1, 2002. The Tribunal did, in a rather haphazard manner, examine the facts of the case while, at the same time, ostensibly refusing to address the issue of the termination of the rent subsidy.

97. *Liszek*, *supra* note 95 at 1.

98. *Victoria Park Community Homes Inc. v. Liszek* (27 March 2002; McCutcheon) File No. SOL-29889-RV (ORHT). It appears that the *SHRA* did not apply to the housing provider at the time of the decision in October 2001 but applied as of December 1, 2001. If the *SHRA* had applied to the facts, the housing provider would have failed to follow the procedure for opportunity to comment, notice of decision and internal review. The landlord, in effect, gave the tenant a notice of final, rather than proposed, decision.

99. *Ibid.*, at 1, 2. See also *Sunshine Homes Non-Profit Inc. v. Allen* (13 November 2001; Lummiss) File No. TEL-23221 (ORHT). The legal basis for revoking the subsidy in *Allen* was never made clear. It is also not entirely clear whether the Tribunal felt it had no jurisdiction to determine if the subsidy had been properly revoked, or whether it found jurisdiction and decided the landlord was justified in the circumstances. In any case, it is clear that the Tribunal did not conduct a rigorous challenge of the landlord's reasons for revoking the subsidy.

2. Exercise Discretion for Relief from Eviction

In *Supportive Housing Coalition v. Mark and Thomas*¹⁰⁰ on the other hand, although the Tribunal stated that it had no jurisdiction to review the level of rent subsidy, it also confirmed that it did retain the broad authority to refuse to evict a tenant in a RGI unit if the evidence indicated that the landlord had not treated the tenant fairly in deciding to revoke the subsidy:

The Tenant Protection Act contains no procedure for the determination of the level of subsidy entitlement of tenants in units which the rent is geared to income and it would be inconsistent with the exemptions contained in Section 5¹⁰¹ for the Tribunal to interpret its mandate to include this power.

It was therefore ruled that the Tribunal has no jurisdiction to review the landlord's decision and fix the rent at a different amount.

*However, if the evidence indicated that the landlord had treated the tenant unfairly in arriving at the decision to increase the rent, the Tribunal may exercise its discretion under subsection 84(1) of the Act to refuse to grant an eviction order.*¹⁰² [emphasis added]

The Tribunal declined on the facts to grant relief from eviction to the tenants, determining that the tenants had not fully disclosed their income and that the landlord had treated the tenants fairly.¹⁰³

B. Determining the Circumstances behind the Termination of a Rent Subsidy

The Tribunal has in some instances reviewed the evidence surrounding the termination of a subsidy and made its own determination as to whether the increase to market rent was appropriate. In *South Hastings Non-Profit Housing v. Horlock*,¹⁰⁴ the landlord withdrew a rent subsidy on the basis that the tenant had not reported another person allegedly living in his unit. The Tribunal reviewed the evidence presented by the landlord and found it insufficient. On this basis, the Tribunal held that the landlord's decision to revoke the subsidy and increase the tenant's rent from \$32 to the market rent of \$577 was "inappropriate and must be reversed."¹⁰⁵

In other decisions, the Tribunal has held that it has jurisdiction to consider the circumstances surrounding revocation of a rent subsidy and the lawfulness of the rent

100. *Supportive Housing Coalition v. Mark and Thomas* (6 April 2000; Rogers) File No. TSL-16387 (ORHT).

101. Unfortunately, the decision contains no analysis of the provisions of s. 5.

102. *Supra* note 100 at Reasons 1, 2.

103. *Ibid.*, Reasons at 4. In *Ottawa Community Housing Corporation v. Eddy* (20 December 2002; Cote) File No. EAL-32674-SA (ORHT) the Tribunal ordered an eviction but postponed the issuance and enforcement of the order under s. 84 until the tenant had completed the "...appeal process of a decision to increase her rent from \$265 to \$839 per month" (Order at 1). *Eddy* eventually settled.

104. *South Hastings Non-Profit Housing v. Horlock* (17 January 2000; MacInnis) File No. EAL-10854 (ORHT).

105. *Ibid.*, Order at 3.

claimed, where there is evidence of bad faith on the part of the landlord or of a failure to follow its own policies.¹⁰⁶ However, in *Operating Engineers Local 793 Non-Profit Housing Inc. v. Dunbar*,¹⁰⁷ and in two other decisions, the Tribunal defined the scope of its jurisdiction even more broadly. The Tribunal stated:

If the rent the tenant has been required to pay has been effectively increased by the discontinuance of a subsidy and this discontinuance is the result of an alleged breach of the tenancy agreement then it is within the jurisdiction of the Tribunal to determine whether or not such a breach did in fact occur.¹⁰⁸

In *Pottinger*,¹⁰⁹ a TPA s. 86 arrears only application, the Tribunal stated:

Landlords of rent-geared to income housing often take the position that the Tribunal should simply accept the arrears are whatever the Landlord states them to be. I reject this proposition. In many cases, the Tenant does not dispute the validity of the amounts claimed by the landlord and, in those cases, the Tribunal need not delve further into that issue. *Where the validity of the rent charged is raised, however, I find that the Tribunal has the jurisdiction and obligation to make a determination of that issue as a precondition to making an order for payment of arrears to the Landlord.*¹¹⁰ [emphasis added]

Lastly, in *Kancro Non-Profit Homes Corporation v. Spajic*,¹¹¹ the Tribunal clearly stated that in deciding an arrears application involving revocation of a subsidy, it must be satisfied that the evidence supports the allegations relied upon by the landlord in increasing the rent to market levels:

I agree that if the Tenant was receiving unreported income, then pursuant to the terms of the tenancy agreement, the Landlord would have the authority to terminate the subsidy. *However, in making my determination as to what the lawful rent owing is, either the subsidized rent or market (after subsidy revoked) I must therefore be satisfied that the Tenant was receiving unreported income.*¹¹² [emphasis added]

The Tribunal found that the tenant did not fail to report any change in circumstances that may have affected the amount of or the eligibility of the tenant for a rent subsidy as the tenant was not receiving the benefit of any of her husband's income.¹¹³

106. *Metropolitan Toronto Housing Authority v. Atufa* (17 December 1998; Feldman) File No. TSL-02803 (ORHT); *Operating Engineers Local 793 Non-Profit v. Dunbar* (21 February 2001; Feldman) File No. TNL-21094 (ORHT).

107. *Ibid.*, *Dunbar*.

108. *Supra* note 106, *Dunbar* Reasons at 7. The Tribunal evicted the tenant but delayed enforcement until the end of the school year, a period of four months.

109. *Pottinger*, *supra* note 85.

110. *Ibid.*, Reasons at 2. The Tribunal ordered an eviction but allowed the tenant 28 days to pay the arrears of \$673 and costs to void enforcement of the order.

111. *Kancro Non-Profit Homes Corporation v. Spajic* (7 November 2001; Graham) File No. CEL-18329 (ORHT).

112. *Ibid.*, Order at 2.

113. *Supra* note 111 at 3. In *Myriad Property Management v. Isse* (6 December 2002; Basu) File No:

C. *No Authority to Make an Order for Arrears of Rent or Eviction*

It may be fairly asked that if the Tribunal does not have the jurisdiction to consider the issue of the revocation of a rent subsidy, on what basis does it have the jurisdiction to make an order for market rent arrears and an order evicting the tenant? If the Tribunal cannot decide whether a subsidy has lawfully been revoked or varied, how may it determine that the tenant has not paid the lawful rent owing under a tenancy agreement?¹¹⁴

The Manitoba Court of Appeal has held that an adjudicator cannot order payment of rent arrears without a determination having been made as to whether the rent is lawful. In *Schoen v. Manitoba Housing Authority*,¹¹⁵ the Court determined that the question of whether CPP benefits were income¹¹⁶ of the children or the father was a question of law and not merely a matter for the landlord to decide. Kroft J.A. stated:

In light of the foregoing I agree that the Commission was correct in deciding that the Residential Tenancies Branch has no jurisdiction in assessing what can and cannot be used in calculating rent geared to income for subsidized housing. *However, I am also of the view that having reached this decision, both the Director and the Commission proceeded erroneously and that both the order to pay and the order to vacate are without foundation.*

...As they were entitled to do, the tenants disputed the lawful right of the landlord to give notice. Both the hearing officer and later the Commission held (correctly as I have found) that there was no jurisdiction to deal with the dispute raised by the

TNL-41741(ORHT), the landlord terminated the subsidy for failure to report the presence of another occupant in the unit. The Tribunal held that it "...may hear evidence to determine if action taken against a Tenant is arbitrary" (Order at 1, 2). The Tribunal heard evidence and found that the tenant had failed to report the presence of other occupants.

114. With respect to housing projects covered by the *SHRA*, the phrase "rent owing under a tenancy agreement" may include "rent owing under the *SHRA*". Under s. 21(1) of O.Reg. 339/01, the tenancy agreement must meet certain specific criteria including stating the market and RGI rent payable, and under s. 22(1) the rent payable in an RGI tenancy is the amount determined under Part V of the *SHRA*. Under the *SHRA*, the emphasis should be on whether the rent increase was in compliance with the *SHRA* and not what the terms of the tenancy agreement dictate. Any increase would still have to be in compliance with the *SHRA*, in the same way that a rent increase taken by a private sector landlord which was not in compliance with s. 127 of the *TPA* could not legally be taken, even if the tenancy agreement provided otherwise.
115. *Schoen v. Manitoba Housing Authority* (1997), 97 Man. R. (2d) 260, [1994] M.J. No. 626 (C.A.)(QL).
116. A comparable case under the *SHRA* would concern the interpretation of Part VII of the O.Reg. 298/01 and the calculation of RGI assistance. Subsection 50(3) defines what is not to be included as income in determining the household income for the purposes of assessing RGI assistance. It would appear that CPP benefits would be considered income, except for a death benefit received under the CPP (s. 50(3)8). Nevertheless, this inquiry constitutes a "question of law" that the Tribunal may be required to address prior to making any determination about the amount of "lawful" rent owing. Alternatively, it may be that the process of calculating the amount of the RGI assistance by determining what is "income" within the meaning of the *SHRA* is beyond the scope of the Tribunal's jurisprudence. As stated in *Schoen*, "...the Residential Tenancies Branch has no jurisdiction in assessing what can and cannot be used in calculating rent geared to income for subsidized housing."

tenants. Nonetheless, pursuant to the Housing Authority's claim and pursuant to its policies, they purported to make a final determination of the amount owing and to grant an order evicting the tenants. *I am convinced that if they did not have the jurisdiction to resolve the question of law that was before them then they had no foundation upon which to base the orders that were made.*¹¹⁷ [emphasis added]

The Court of Appeal concluded that the question of whether the CPP benefits could be included in income to calculate the RGI rent payable required an interpretation of the statutes governing rent fixing for subsidized housing and federal provincial agreements. The issue was to be resolved by applying for a declaratory order¹¹⁸ from the Court of Queen's Bench with respect to the meaning and effect of the relevant statutes and agreements.

V. LOOKING BEHIND THE CIRCUMSTANCES

The weight of Tribunal case law has followed the reasoning set out in *Liszek*¹¹⁹ and *Barrowcliffe*¹²⁰ and has refused jurisdiction to make rent subsidy determinations. The effect of this position has generally been to leave social housing tenants involved in disputes with their landlord with no effective means to effectively dispute an adverse decision on the merits.

The general approach of the Tribunal may be summed up as follows:

... if the tenant believes the subsidy is miscalculated, the Tenant may apply to the proper forum, and procedures under Social Housing Reform Act, not the Tenant Protection Act. The Ontario Rental Housing Tribunal is not a reviewing body, or appellate body, for calculations of subsidy.¹²¹

The Tribunal's reasons fail to recognize the fundamental problem that the *SHRA* only provides for an internal review by the social housing landlord or service manager. The Tribunal is the first and only independent decision maker who will have any opportunity to review decisions regarding subsidy.¹²² As argued below, the Tribunal has both the jurisdiction and the obligation to determine what the lawful rent owing is before it can justify issuing an eviction order.

The arguments in this part are equally applicable to the pre-*SHRA* and *SHRA* contexts. If the *SHRA* is applicable to the facts of a particular case, arguments concerning the *SHRA* may be raised in addition to the arguments below. There are two main types of

117. *Schoen*, *supra* note 115 at 264.

118. In Ontario, declaratory orders, or binding declarations of right, may be made by the Superior Court of Justice, except the Small Claims Court: *Courts of Justice Act*, R.S.O 1990, c. 43, s. 97.

119. *Supra* note 95.

120. *Supra* note 96.

121. *M.F. Arnsby Property Management Ltd. v. Kennedy* (28 November 2002; Rodenhurst) File No: SWL-41858-RV (ORHT). The Member further stated that it could not "adjudicate on the issue of who should occupy social housing and who should not occupy social housing" (Order at 1), which, in light of *TPA*, s. 60(1)2, would appear to be incorrect.

122. Unless an application for judicial review of the internal review decision is brought.

arguments under the *SHRA* – (i) lack of procedural compliance with the rent increase (*i.e.*, the procedural merits) and (ii) review of the internal decision to revoke or vary the RGI assistance itself (*i.e.*, the substantive merits).¹²³

A. Statutory Interpretation of Subsections 61(1) and 86(1) of TPA

1. Principles of Statutory Interpretation

Those Tribunal members who decline jurisdiction in subsidy matters are correct in one respect: there is no provision in either the *TPA* or *SHRA* that expressly states the Tribunal has the jurisdiction to determine whether or not a tenant is entitled to a subsidy. However, that does not necessarily mean that there is no such jurisdiction.

In the absence of any express provision, recourse may be made to the principles of statutory interpretation to determine whether the jurisdiction is implicit. The preferred approach to statutory interpretation is found in Driedger¹²⁴ and has been repeatedly cited by the Supreme Court of Canada:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹²⁵

The Supreme Court clarified that all other principles of statutory interpretation are subsidiary and come into play only where there is a “real” ambiguity as to the meaning of a provision in that the provision is “reasonably capable of multiple interpretations.”¹²⁶

Furthermore, in the event of any real ambiguity, modern statutory interpretation requires the application of legislation to the facts in a way that makes the consequences acceptable. The principle of presumption against absurdity provides that where legislative language may be construed in two ways, one of which would lead to absurdity, the courts should presume that such a result could not have been intended. Absurdity can include illogicality, incoherence or incompatibility with other provisions or with the purpose of the legislation.¹²⁷ The presumption against absurdity supports an expansive interpretation of the Tribunal’s jurisdiction, given the

123. These arguments pertaining to the *SHRA* are set out in greater detail, *infra* at Part VI – The Proper Approach for the Tribunal.

124. E. Driedger, *Construction of Statutes*, 2^d ed. (Toronto: Butterworths, 1983) at 87.

125. *Bell Express Vu Limited Partnership v. Rex* (2002), 287 N.R. 248, 212 D.L.R. (4th) 1 (S.C.C.) *per* Iacobucci J. at 19 (D.L.R.) citing Driedger.

126. *Ibid.*, at 21 (D.L.R.). The Court also stressed that “it was necessary to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if the ‘words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning’ (at 21 (D.L.R.)).

127. See Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Qc.: Yvon Blais, 1991) at 373-383.

differences between the misrepresentation of income application and “economic eviction” applications discussed below.

Finally, an interpretation of the *TPA* that declines jurisdiction is incompatible with the specific statutory exemptions for social housing and fails to comply with the presumption of legislative intent of compliance with constitutional norms, namely equality before and under the law. It is argued below that both the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code* may be applied to an interpretation of the *TPA*.

2. Plain and Ordinary Meaning of Subsection 61(1)

It is arguable that there is no ambiguity in ss. 61(1) and 86(1) and there is therefore no need to apply any other principles of statutory interpretation. The ordinary sense of “lawfully owing” means owes in accordance with the law, which would include the law as set out in the *SHRA* and regulations. The Tribunal need not be reluctant to interpret the provisions of other statutes beside the *TPA* where applicable.¹²⁸ The *TPA* is not a complete code and the Tribunal routinely applies other common law principles or statutes.

The Tribunal does have to determine the “lawful rent” in any arrears application where the amount claimed is disputed, and there is nothing in either the *TPA* or *SHRA* that would take away this jurisdiction because the determination of the lawful rent requires consideration of the rules respecting eligibility for a subsidy. The real question is what is the meaning of lawful rent in the *TPA* and the common position of the Tribunal is that this means, in an RGI context, the market rent. There is nothing in the legislation, however, that would support the position that the lawful rent under the *TPA* means market rent under the *SHRA*. This is simply a bald statement of the Tribunal, bereft of analysis and unable to withstand scrutiny.

The Tribunal, in deciding an eviction application under s. 69 of the *TPA*, must consider whether grounds for termination exist under s. 61. The language of ss. 61(1) and 86(1) expressly incorporate the concept that a notice can be served or an application can be made only where rent is “lawfully owing” or where the tenant has not paid rent “lawfully required” under the tenancy agreement. That is what the Tribunal must determine before granting an application for termination based on arrears of rent. First, the rent claimed to be owing must be in accordance with the tenancy agreement, and second, even if set out in the tenancy agreement, the rent claimed must be a rent the landlord can lawfully charge.

128. The Tribunal has applied the provisions of the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 to eviction applications. In *Longo Properties Ltd v. Clarke* (20 February 2002; Beckett) File No. TSL-35686-SA (ORHT), the Tribunal held that “it is incumbent on the Tribunal to consider the *Code* if it affects a tenant in their housing needs” (at 2). The Tribunal further found that the apparently neutral rule of the landlord that it would not tolerate excessive noise had an adverse impact on this tenant, as her making noise was beyond her control and due to her disability. Therefore, the decision to evict based on the noise amounted to constructive discrimination for the purposes of the *Code*. Whereas other tenants would only be evicted if they deliberately caused noise, because of her disability, the rule had an unduly harsh effect on this tenant, and on that basis the set aside was granted and the eviction was refused.

The written lease or occupancy agreement now required by O.Reg. 339/01 provides that the amount of the RGI rent payable by the household for the unit is subject to change if (i) the household's financial circumstances change to such an extent that the RGI rent payable should change or (ii) that the household is no longer eligible for such assistance. The lease must specify the market rent, the RGI rent payable for one month by the household, and all other charges that the housing provider may impose.¹²⁹ Under these regulations it is clear that the "rent" is not always the same fixed "market" amount, but may vary based on circumstances. The "rent" is simply the amount the tenant is required to pay each month to stay in good standing. If the intention was that "rent lawfully owing under the tenancy agreement" in social housing always means the market rent, then presumably different language would have been used. It is also important to note that the definition of "rent" under the *SHRA* regulations is the same in the *TPA*.¹³⁰

This is illustrated in *Barrowcliffe*,¹³¹ where the tenancy agreement provided that the landlord could, where information was not provided or was incomplete or false:

- (i) require that the tenant pay the current full market rent for the Unit; and/or
- (ii) recalculate the rent for the whole period of time that you have lived in the Unit and require that you pay us the full amount of rent (at the rate we have calculated for this period of time) on demand; and/or
- (iii) apply to the Ontario Rental Housing Tribunal to evict you.

The second scenario – recalculation of rent – is consistent with a misrepresentation of income application as it concerns retroactive rent arrears, or an assessment of a rent "underpayment" under s. 86 of *SHRA*.¹³² In a misrepresentation of income application under ss. 62(2) and 88 of the *TPA*, the landlord may seek retroactive arrears.¹³³ The

129. O.Reg. 339/01, s. 21.

130. O.Reg. 339/01, s. 2. The *TPA* provides that "rent" includes the amount of any consideration paid or given or required to be paid or given by or on behalf of a tenant to a landlord or the landlord's agent for the right to occupy a rental unit and for any services and facilities and any privilege, accommodation or thing that the landlord provides for the tenant in respect of the occupancy of the rental unit, whether or not a separate charge is made for services and facilities or for the privilege, accommodation or thing, but "rent" does not include,
 (a) an amount paid by a tenant to a landlord to reimburse the landlord for property taxes paid by the landlord with respect to a mobile home or a land lease home owned by a tenant, or
 (b) an amount that a landlord charges a tenant of a rental unit in a care home for care services or meals.

131. *Supra* note 96.

132. As discussed in *supra* section III-C, *SHRA*, s. 86 and the corresponding regulations provide that, if a tenant has not paid the rent required, the amount can be collected in addition to the rent otherwise payable at a rate of not more than 10% of the monthly rent. This provides a means for a landlord to recoup arrears without terminating a tenancy, and essentially parallels the "overpayment" collection provisions in social assistance.

133. Referred to as "compensation" in s. 88. In this paper, "retroactive rent arrears" means those arrears of rent that arise as a result of a landlord's recalculation of RGI rent payable during a period of time

first scenario – raising the rent to market – permits the landlord to increase the rent to market if grounds exist under the *SHRA* and regulations and subject to the rent increase provisions of the *TPA*. The tenancy agreement, therefore, provides contractual authority for the landlord to charge the market rent, but the circumstances and timeframe under which an increase may be lawfully applied are determined under the *TPA*, the *SHRA* and accompanying regulations.

At the Tribunal, the problem arises where the landlord claims that the rent owing is the market rent specified in the tenancy agreement, and the tenant disputes that claim, saying the lawful rent is the lower subsidized rent. In such cases, in order to determine the lawful rent, the Tribunal has to look to the rules regarding cancellation of subsidies under the *SHRA* and regulations and to the evidence to determine whether in fact the subsidy was properly cancelled, and whether or not the amount of rent claimed by the landlord is what the tenant in fact lawfully owes.

However, in cases such as *Liszek*¹³⁴ and *Barrowcliffe*,¹³⁵ the Tribunal has been unwilling to cross this line and make a determination as to whether the subsidy was properly terminated and the claimed arrears were lawfully owed. In the review decision in *Liszek*,¹³⁶ the Tribunal seemed to suggest that this is because, for the purposes of the *TPA*, the “lawful rent owing under a tenancy agreement” is always the “market rent” regardless of whether this is the amount the tenant owes each month. If this is correct, it means the Tribunal must accept without question that a social housing landlord’s decision to terminate a subsidy is always justified.

3. Purpose of the *TPA*

In general, the purpose of the *TPA* is to consolidate and revise the law relating to residential tenancies in order to protect tenants while easing rent control restrictions on landlords.¹³⁷ However, it is also evident that the *TPA*’s primary objective is the protection of tenants. In *Metropolitan Toronto Housing Authority v. Godwin*,¹³⁸ the

prior to the decision being made, as opposed to arrears that arise due to failure to pay the RGI or market rent as it becomes due. Alternatively, the landlord might utilize their s. 86 *SHRA* authority. Further, the fact that the *TPA* provides for a method of obtaining retroactive arrears based on misrepresentation of income reasonably implies that a landlord could not seek retroactive arrears in an application based on s. 61 or 86, except in those circumstances where arrears have accumulated due to a tenant’s failure to pay the new RGI rent payable as a result of a s. 86 *SHRA* re-calculation, based on the principle of *expressio unius est exclusio alterius*. If this were otherwise, the rather bizarre result would arise that a public housing landlord would have to justify a decision to evict where the tenant had knowingly and materially misrepresented their income, but otherwise would be able to evict without having to prove a thing; see *infra*, discussion under C.

134. *Supra* note 95.

135. *Supra* note 96.

136. *Supra* note 98.

137. Jack Fleming, *Residential Tenancies in Ontario* (Toronto: Butterworths, 1998) at 8-10.

138. *Metropolitan Toronto Housing Authority v. Godwin* (2002), 161 O.A.C. 57, [2002] O.J. No. 2514 (C.A.)(QL).

Court of Appeal has made the clearest statement to date of the interpretative approach to be applied to the *TPA*:

The statutory framework that governs the Tribunal's jurisdiction in connection with applications, including applications for rent abatements, argues for an expansive view of the Tribunal's jurisdiction over the presentation of evidence before the Tribunal. In my view, a liberal interpretive approach should govern interpretation of a remedial statute such as the Act, in a manner consistent with its tenant protection focus.¹³⁹

In determining what is meant by "rent lawfully owing under a tenancy agreement", an interpretation that effectively removes a tenant's only practical means to challenge a social housing provider's decision is inconsistent with the statutory objective of tenant protection.

4. Avoiding Absurd Consequences

Where the Tribunal declines jurisdiction, there can be serious adverse consequences visited upon RGI tenants. Some of the results emphasize the practical consequences of the Tribunal's position that they have no jurisdiction. It would be absurd and inequitable, particularly in the absence of any specific supporting statutory language, to accept an interpretation of the Tribunal's jurisdiction under the *TPA* that would place tenants in RGI housing in a disadvantaged position.¹⁴⁰

a) *Termination of Subsidized Tenancies*

Social housing landlords and private sector landlords have identical access to all grounds of eviction set out in the *TPA*. However, a social housing landlord has two additional grounds available – misrepresentation of income and ceasing to qualify for occupancy of the rental unit. A comparative analysis of these two grounds of eviction with the ground of arrears of rent demonstrates that, on the same facts and given the Tribunal's position regarding jurisdiction, landlords enjoy a less onerous task should they choose to evict based on arrears of market rent. Rather than demonstrating that a tenant has knowingly misrepresented his or her income or that the tenant has ceased to qualify for occupancy of the rental unit, social housing landlords can characterize the matter as arrears of rent once the tenant fails to pay the market rent. It is in the latter case that the Tribunal has generally declined jurisdiction to assess the merits of the case.

139. *Ibid.*, per Cronk J.A. at para. 19. Such an approach is further supported by the *Interpretation Act*, R.S.O. 1990, c.I-11, s. 10, which provides that every enactment "is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

140. For example, consider the scenario where a tenant fails to report a *decrease* in household income, which, if reported, would have resulted in a corresponding decrease in the RGI rent payable. The housing provider may nevertheless decide, pursuant to s. 10 of O.Reg. 298/01, that the household failed to provide the information required, terminate the tenant's subsidy under s. 12(1)(i) of O.Reg. 298/01 and claim the market rent.

1. Misrepresentation of Income

In misrepresentation of income applications, social housing landlords have the burden of proving that a tenant has misrepresented their income. Not only does this require that the landlord satisfy the Tribunal, in most cases, through documentary and oral evidence that the misrepresentation of income was intentional, but the standard of proof is arguably higher than a balance of probabilities.¹⁴¹

Both the courts under the *Landlord and Tenant Act (LTA)*, and the Tribunal under the *TPA*, have had no hesitation in reviewing the circumstances surrounding the termination of a subsidy where social housing landlords applied to evict on the grounds that the tenant has misrepresented his or her income or that of other members of his or her family occupying the rental unit.¹⁴²

The language of s. 62(2) of the *TPA*, like s. 107(1)(f) of the former *LTA*, provides that a landlord will have grounds for termination if the tenant in a RGI unit has “knowingly and materially” misrepresented income. Accordingly, in an application brought under s. 62(2), the Tribunal is required to review the factual evidence regarding the cancellation of a subsidy in order to determine if grounds for termination exist. If there has been misrepresentation of income and the landlord is also applying for compensation (rent arrears), the Tribunal must calculate the rent arrears from the point at which the subsidy was properly revoked.¹⁴³

141. In *Bogey Construction Limited v. Boileau*, [2002] O.J. No. 1575 (Div. Ct.) (QL) the Court held that allegations of criminal conduct in a civil context against the tenant required a higher degree of proof that is “commensurate with the gravity of the allegations”. The landlord alleged that the tenant broke into the mail boxes of other tenants in the residential complex. Arguably, the ratio is not limited to illegal act applications under s. 62(1) but can also apply to misrepresentation of income applications under s. 62(2).

142. *Landlord and Tenant Act*, R.S.O. 1990, c.L.7, s. 107(1)(f); *TPA*, s. 62(2). In *Peel Non-Profit Housing Corp. v. Myers*, [1995] O.J. No. 3355 (Gen. Div.) (QL) leave to appeal denied (1997), 74 A.C.W.S. (3d) (Ont. C.A.), the landlord alleged income misrepresentation, including failure to notify of a change in income, the court reviewed the evidence and determined that there had been no material or intentional misrepresentation by the tenant. On this basis, the court refused to order repayment of arrears or to terminate the tenancy. In another *LTA* decision with a different result, *Region of York Housing Corp. v. Docherty*, [1994] O.J. No. 3083 (Gen. Div.) (QL), the Court also considered evidence of unreported business earnings and determined that the tenants had misrepresented their income in failing to report those earnings as required by the terms of their rent-subsidized tenancy agreement.

In *North Waterloo Housing Authority v. Castro*, (18 Januray 1999; Tinker) File No: SWL-03348 (ORHT), a case decided under the *TPA* and factually similar to *Liszek*, the landlord alleged that the tenant had misrepresented her family income by failing to report her husband’s continuing presence in the rental unit. The Tribunal stated:

The burden of proof is that of the Landlord, who must prove, on a balance of probabilities, that the Tenant husband, Mr. Castro, never left the residential premises. ...

The tribunal finds that the Landlord has failed to produce any witnesses to clearly place Mr. Castro residing at the premises. The Tribunal finds that the explanation given with respect to the school records to be a reasonable one. As to the other evidence produced by the Landlord, it is, at best, circumstantial. The Landlord has failed to discharge the burden of proof.

143. *TPA*, ss. 62(2), 88.

However, in cases where the Tribunal determines that there has been no knowing and material misrepresentation, the Tribunal in effect reinstates the revoked subsidy.¹⁴⁴ An application based on misrepresentation of income in a RGI tenancy does not focus on whether the landlord acted fairly in revoking the subsidy but rather on whether the landlord has satisfied the onus of proving that a tenant has knowingly made a material misrepresentation of income. In other words, the Tribunal's inquiry focuses on the substantive merits of the case and not on the procedure implemented by the landlord in revoking or varying the subsidy.¹⁴⁵

The remedy available to a social housing landlord in a misrepresentation of income application is eviction and an order for the rent that would have been payable but for the misrepresentation under s. 88 of the *TPA*. The tenant would also be ineligible for social housing for a period of two years under O.Reg. 298/01, ss. 7(1)(h) and 16. A virtually identical remedy can be obtained in the same fact situation where the landlord cancels a subsidy, raises the rent to market, serves notice under s. 61 of the *TPA* and commences an eviction application under ss. 69 and 86. If the landlord proceeds in this manner, however, the Tribunal will generally issue an order for the payment of the arrears, and eviction if the arrears are not paid within a week, without looking behind the decision to cancel the subsidy. Though technically the right to void an order means the eviction is less certain than it would be in a misrepresentation of income order, the reality is that tenants whose resources were low enough to make them eligible for a subsidy in the first place will have little chance of coming up with what is often thousands of dollars within a week. Furthermore, a tenant would not be eligible for housing again until the arrears were paid off or an agreement was reached with the former landlord.¹⁴⁶ The practical result is that the landlord can achieve the same result by bringing an arrears application as they could by bringing a misrepresentation of income application – but in the former, if the Tribunal does not take jurisdiction to determine the question of whether the subsidy was properly cancelled, the landlord does not have to prove its case and the tenant has no independent forum to challenge the decision.¹⁴⁷

Social housing landlords could avoid proving misrepresentation of income by simply revoking a tenant's rent subsidy and giving the tenant a notice of termination under s.

144. The subsidy is reinstated as the landlord's decision to recalculate the rent is overturned for the period that the landlord claimed the difference between the original RGI rent payable and the rent that was actually payable due to the inclusion of the unreported/underreported income in the calculation of the RGI rent.

145. If the Tribunal does not do so then a tenant who may have "innocently" misrepresented income would be in a worse position than a tenant who has knowingly misrepresented income.

146. O.Reg. 298/01, s. (7)(1)(e).

147. In *Liszek*, *supra* note 95, the question of whether the tenant's brother was residing with the tenant was a question of fact which must, in our view, be determined by the Tribunal before it can decide, as a question of law, whether or not the tenant was required to disclose his brother's income and whether or not there are arrears of rent "lawfully owing" within the meaning of s. 61(1) of the *TPA*. The Tribunal need only consider the factual evidence and the terms of the tenancy agreement to decide if (a) the tenant is in breach of the tenancy agreement; (b) if so, whether termination of the tenancy is warranted and (c) whether relief from eviction is appropriate in all of the circumstances.

61(1) for rent arrears at market rates, instead of a notice under s. 62(2) for misrepresentation of income.¹⁴⁸ This seriously jeopardizes the security of tenure of tenants in social housing and is inconsistent with both the overall purpose of the *TPA* and the specific intention of the legislature in requiring evidence of knowing and material misrepresentation under s. 62(2). This result, which has played itself out regularly before the Tribunal, has resulted in a serious breach of natural justice for tenants in social housing, who are faced with an eviction application and no effective forum in which to challenge the application.¹⁴⁹

The fact that there may be a right to an internal review of a decision does not mean the tenant has an effective means to dispute a decision. There is a significant difference between an internal review and an appeal to an independent decision maker. Though an internal review may satisfy the requirements of procedural fairness, it does not necessarily satisfy the requirements of natural justice.¹⁵⁰

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148. Alternatively, a landlord might bring a misrepresentation of income application in good faith where the tenant has simply failed to supply income/asset information but there is no actual evidence that the tenant has failed to report a *change* in income/asset information. Though rare, the fact that such applications may be brought is testimony to the fact that the *SHRA* and its regulations can be quite difficult to fathom, even for those charged with administering them.
149. However, the natural justice implications of the Tribunal's failure to take jurisdiction in these cases has been disputed in a recent article by Henry Vershuren, an experienced representative and currently a law clerk with the Brampton law firm of *Acri, MacPherson* in ONPHA, *Case Law Quarterly* 1: 3 (March 2002). The article, primarily a discussion of the *Dunbar* decision of the Tribunal, warns that, where an application under the *TPA* for misrepresentation of income or ceasing to qualify would be appropriate but the landlord nonetheless chooses to bring an arrears application, the landlord may run the risk of having their application dismissed altogether, in large part because the Tribunal may have a "rightfully held suspicion of economic evictions" (at 3). Mr. Vershuren claims that natural justice and procedural fairness are served, even where there is no consideration of the merits at the Tribunal, because the decisions of the housing provider are subject to a "legislated right to a reconsideration of a decision to declare the tenant ineligible for rent subsidy" (at 6). However, the paper fails to note a fundamental problem; this "legislated right" is not a review by an independent body. The legislated right is only a right to an *internal* review, *i.e.* the decision is simply reviewed by another person or persons within the same hierarchy who made the original decision.
150. The distinction is perhaps best articulated in *Carson* (9 July 1986; Collier) by Collier J., sitting as an Umpire in an appeal under the former *Unemployment Insurance Act*, R.S.C. 1985, c.U-1 (at paras. 30-33):

I suggest, perhaps, that the Unemployment Insurance Act be amended to make someone, such as an Umpire, the decider as to whether there is a proper case for waiving repayment or reducing the amount of repayment sought.

The scheme of the Act is this. The Commission decides the rate of benefit. The Commission decides how long the benefits are to be paid. If it makes an error, as it did here, then the Commission demands repayment. So it becomes the collector and the prosecutor in respect of repayment.

The Commission is the only one that can decide whether repayment should be waived under the circumstances set out in Section 60 of the Statute. The Commission then turns from prosecutor into judge.

So far as I know, the Commission does not hold any hearings on the merits of a claim for waiver

In the social housing context, it is the landlord who makes the request for information, then makes a decision and then, if a request for a review is made, reconsiders whether it made the right decision in the first place. Without an independent right of appeal, and where the Tribunal does not take jurisdiction, the social housing landlord and service manager sit as plaintiff, prosecutor, and judge on its own case. To satisfy the requirements of natural justice, and given the serious implication of the decisions made by a social housing landlord, as a matter of public policy, disputes regarding social housing subsidies should be subject to review by an impartial arbiter. The jurisdiction to be that arbiter already lies with the Tribunal. The issue is for the Tribunal to recognize and accept this responsibility.

2. Ceasing to Qualify

In addition, a social housing landlord may choose to terminate a tenancy where:¹⁵¹

The rental unit ... is a rental unit as described in paragraph 1, 2 or 3 of subs. 5(1) and the tenant has ceased to meet the qualifications for occupancy of the rental unit.¹⁵²

At first blush, s. 60(1) 2 might appear applicable only to cases involving the type or size of housing based on family composition or a specific status; these are the only grounds under the *SHRA* and regulations that specifically address the qualifications for occupying a unit, as opposed to qualifications of eligibility for a subsidy.¹⁵³ For example, a landlord might try to evict where a tenant is overhoused and no longer qualifies for a three-bedroom unit because a child has left or because the tenant is no longer a student. However, it might also be used where the landlord equates “ceasing to qualify for RGI assistance” with “ceasing to qualify for occupancy of the rental unit”.¹⁵⁴ The definition of “rental unit” under the *TPA* indisputably includes RGI

of repayment. That seems to me a violation of, probably, the rules of natural justice. It may be Parliament should consider, as I have said earlier, giving the power under Section 60 to some other body, other than the Commission. In that case claimants could make an application for waiving repayment or reducing repayment. Both sides could give evidence, the claimants and the Commission, and the impartial arbiter would then make a decision.

151. From a social housing landlord's perspective, there are at least two drawbacks to ceasing to qualify applications. First, it is an end of term eviction, so the notice cannot be effective prior to the end of the lease (assuming a new lease is signed every year, as is standard practice in social housing) – which may be many months away. There is also no payment of arrears option.
152. Subsection 60(1) 2. Note that the definition no longer applies to a rental unit in a privately owned and managed building. It applies to complexes administered by or on behalf of the Ontario Housing Corporation, the Government of Canada or an agency of either of them, or whose ownership, operation or management is transferred by the OHC or Canada under the *SHRA* to a service manager or local housing corporation; a rental unit located in a non-profit housing project or other residential complex, if the non-profit was developed or acquired under a prescribed federal, provincial, or municipal program, and continues to operate under various provisions of the *SHRA*, or rental unit provided by a non-profit housing co-operative to tenants in non-member units.
153. See O. Reg. 298/01, Part V with respect to occupancy standards.
154. As noted, the two are not the same, as a tenant who ceases to qualify for RGI assistance under the *SHRA* could presumably continue to occupy the unit, provided they pay the market rent (subject to the argument described in this paragraph).

assistance rental units.¹⁵⁵ In addition, the definition of “RGI unit” under the *SHRA* is a unit that is occupied by a household receiving RGI assistance or available for occupancy by a household eligible for RGI assistance.¹⁵⁶ If a household is cut off RGI assistance then it may no longer be occupying a RGI unit under the *SHRA*¹⁵⁷ but continues to occupy a “rental unit” under the *TPA*. In this manner, it is at least arguable that the landlord may use s. 60(1) 2 as the household no longer qualifies for occupancy of the (RGI) rental unit because the RGI assistance has been revoked.¹⁵⁸ This was the position taken by the landlord in *Lanark County Housing Corporation v. Doe*.¹⁵⁹

As noted above in section III-B, ceasing to be eligible for a rent subsidy does not automatically mean a tenant has to move out of the unit as the tenant can presumably stay if they pay the market rent. However, some service managers are now incorporating terms in their leases providing that a tenant ceases to qualify for *occupancy* when they cease to be eligible for a subsidy. There is nothing that would expressly allow or prohibit such clauses under either the *SHRA* or *TPA*, and whether such a clause is enforceable is an open question.

In an application brought under s. 60(1) 2, the Tribunal is, as was the case with the courts under the *LTA*,¹⁶⁰ required to review the factual evidence and relevant authorities to make factual findings as a precondition to determining whether the tenant has ceased to qualify for occupancy. The Tribunal’s inquiry once again focuses on the substantive merits of the case. In *Villa Otthon Lambton v. Intriago*¹⁶¹ the Tribunal dismissed a landlord’s application based on ceasing to qualify. The landlord alleged that the tenant had another person residing in the rental unit.¹⁶² The Tribunal stated:

155. A rental unit means any living accommodation used or intended for use as rented residential premises: *TPA*, s. 1.

156. *SHRA*, s. 2

157. The household continues to occupy but is no longer receiving RGI assistance and, because the unit is occupied, it is not available for another household.

158. This argument is quite tenuous, partly because it seems to have, as an underlying assumption, that a subsidy is tied to a specific rental unit. This is not the case as generally, the service levels required under *SHRA*, s. 11 and O.Reg. 368/01, s. 8 and Table 7 set out the total number of RGI units required within a service area, but do not say that one particular unit is RGI, and another is “market”.

159. *Doe* is a pseudonym. The landlord served notice of termination that the tenant no longer qualified to occupy the rental unit as the tenant no longer qualified for RGI assistance because the tenant failed to report a change in income from social assistance to disability benefits. The landlord issued a letter confirming that the tenant’s RGI assistance was revoked and the rent was to go to market rent of \$700. The tenant’s request for an internal review was denied. The matter settled prior to an application being filed at the Tribunal by the landlord.

160. In *Metropolitan Toronto Housing Authority v. Morris* (6 July 1990) (Ont. Dist. Ct.) the landlord applied to evict on the basis that the tenant was no longer a student and had ceased to qualify for occupancy. The Court made reference to the landlord’s lease and the definition of “student” in the *University of Toronto Act, 1971* and concluded that the tenant was, in fact, a student. The landlord’s application was therefore dismissed.

161. *Villa Otthon Lambton v. Intriago* (20 January 1999; Faughan) File No: TSL-03970 (ORHT).

162. Consider that *Lambton* could have been characterized by the landlord as a RGI subsidy termination

No written guidelines or rules were filed that clearly set out the criteria that the tenant must meet to continue to qualify for public housing. The documentation filed by the landlord in support of its application does not assist the landlord in establishing that there is a clearly established criterion that the existence of an adult residing in the tenant's unit results in the tenant ceasing to qualify for public housing.¹⁶³

The question, therefore, is whether the landlord has presented sufficient evidence to the Tribunal to support a finding that there is an appropriate factual basis for revoking the subsidy. Once again, as with misrepresentation of income applications, landlords may be able to achieve the same result without having to actually present any evidence. The effect of the Tribunal refusing jurisdiction in cases where the landlord cancels a subsidy provides social housing landlords with a strong incentive to avoid the burden of proof in applications based on ceasing to qualify for occupancy. Landlords would be able to simply revoke a tenant's rent subsidy where, for example, they suspected that the tenant was no longer a student or another person occupied the unit, and give the tenant a notice of termination under s. 61(1) for rent arrears at market rates.

b. Subsidized Tenants in a Disadvantaged Position

(1) Statutory Right to Dispute

The *TPA* requires the following procedure to be followed when evicting a tenant for arrears of rent, whether the tenant is in a private sector unit or in a RGI unit:¹⁶⁴

- a) The landlord must serve a notice of termination for non-payment of rent setting out the reasons and details respecting the termination;
- b) The landlord may then apply to the Tribunal for an order terminating the tenancy and evicting the tenant;
- c) The tenant has the right to dispute the landlord's application for termination of the tenancy based on arrears of rent by filing a written dispute within five days; and
- d) Where the tenant files a written dispute, a hearing is scheduled to hear and decide the landlord's application for eviction.

Where a landlord applies for an order evicting a tenant from a RGI unit, the tenant is entitled to dispute the application.¹⁶⁵ If the landlord claims arrears of rent at market rates on the grounds that a tenant has breached the tenancy agreement and lost their subsidy entitlement, then that tenant will be prohibited from exercising their statutory

case. The landlord might have taken the approach in *Liszek* – revoke the rent subsidy and claim market arrears of rent where the landlord suspects that another person resides in the unit, and that, by not reporting that person's income, the tenant had failed to provide the necessary information to calculate a subsidy.

163. *Supra* note 161 Order at 1. Should the landlord file such evidence, then the Tribunal's inquiry must include a determination as to whether, in fact, another adult resided in the rental unit.

164. *TPA*, ss. 43, 61, 69, 177, 192(1)1.

165. *TPA*, ss. 43(2), 177(1).

right to dispute the amount of arrears claimed unless the Tribunal will hear and consider evidence concerning the basis for the revocation of the subsidy.

A private housing tenant, or a social housing tenant who pays market rent, can dispute the arrears claimed by the landlord in every arrears application by disputing the landlord's calculation. The Tribunal's failure to exercise its jurisdiction to consider the circumstances resulting in the revocation of a rent subsidy has the effect of creating a subclass of tenants, for whom an arrears application is simply a formality prior to eviction.

(2) Less security of Tenure

Since the inception of residential tenancy legislation in Ontario, the overriding purpose has been to provide security of tenure to tenants.¹⁶⁶ The Tribunal, in determining the scope of its jurisdiction under the language of s. 157(2)¹⁶⁷ and s. 162,¹⁶⁸ must do so within the context of this expressed legislative purpose – the protection of tenant's security of tenure. There is no indication in the *TPA*, expressly or by implication, that the Tribunal was not expected to deal with RGI tenants in a manner that would provide the same degree of protection as non-RGI tenants facing arrears of rent applications.

Tenants in RGI units, if not able to dispute an arrears application before the Tribunal by leading evidence to challenge the basis upon which a subsidy was revoked, will not enjoy the same protection under the security of tenure provisions of the legislation. RGI tenants will have no ability to defend their right to maintain their housing at the Tribunal – the only forum in Ontario with the jurisdiction to terminate tenancies and make eviction orders.

(3) Judicial Review to Maintain Housing.

By declining jurisdiction, the Tribunal is indirectly requiring those RGI tenants who wish to dispute an arrears application on the grounds that a rent subsidy was improperly terminated to do so by bringing an application for judicial review. This is a far more onerous process than is available to a tenant in private rental accommodation or a tenant in market rent social housing. Either of these groups of tenants can use the summary procedure under the *TPA* to challenge the merits of an arrears application, including where there is a dispute regarding the lawful rent payable.¹⁶⁹ A RGI tenant would be required to apply for judicial review of the landlord's decision to revoke the rent subsidy on the basis that the decision was not made in accordance with the rules of natural justice and procedural fairness.¹⁷⁰

166. Jack Fleming, *Residential Tenancies in Ontario*, *supra* note 137 at 3-8.

167. The Tribunal has exclusive jurisdiction to determine all applications under this *Act* and with respect to all matters in which jurisdiction is conferred on it by this *Act*: s. 157(2).

168. The Tribunal has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under the *Act*: s. 162.

169. For example, that the landlord's notice of rent increase did not comply with the 90-day notice period under s. 127 of the *TPA*. Neither a private nor a social housing landlord can arbitrarily raise the rent.

170. As the Tribunal stated in *SHC v. Mark and Thomas*, *supra* note 100:

In *Re Webb and Ontario Housing Corporation*,¹⁷¹ the Court of Appeal held that a tenant in subsidized housing was entitled to procedural fairness where the landlord had made an internal administrative decision recommending termination of tenancy. In that case, the Court did not simply accept the landlord's word that the tenant had substantially interfered with the reasonable enjoyment of other tenants and recognized that a court makes its own determination based on the evidence presented. *Re Webb* illustrates why a judicial review application is an inadequate substitute for a full hearing before the Tribunal. The Court of Appeal established that a tenant is entitled to procedural fairness where the social housing landlord has made an internal decision to evict the tenant but that this does not displace or otherwise affect the jurisdiction of a court (or Tribunal) to assess the application to evict on the merits in a hearing *de novo*.

A RGI tenant disputing an eviction application based on arrears at market rates would be forced to seek an adjournment before the Tribunal pending an application for judicial review. Assuming an adjournment is granted, a tenant would then apply for judicial review and, should it be established that the subsidy was revoked unfairly, the matter would likely be brought back before the Tribunal, after the landlord had made a second internal decision in accordance with the rules of procedural fairness as articulated by the court. Such a process would be lengthy, complicated and expensive – a process incompatible with the summary nature of proceedings under the *TPA* and unduly onerous for social housing tenants.

(4) Dependence on the Tribunal

Relief from eviction may be granted under the *TPA* where the landlord has satisfied the Tribunal that an eviction is warranted on the merits. Where a tenant's subsidy is revoked or varied, the Tribunal might decide to exercise its discretion to grant relief from eviction after consideration of the circumstances regarding the revocation of the subsidy.¹⁷² The Tribunal might decide that the subsidy was revoked in an unfair or arbitrary manner or that the age and income level of the tenant warranted relief. This approach, which was endorsed but not applied by the Tribunal in *SHC v. Mark and Thomas*,¹⁷³ does not allow the tenant to challenge the arrears claim on its merits and makes a decision to evict solely a matter of the Tribunal's discretion. Where the Tribunal refuses to address the merits of the landlords' claim the only relief available to the tenant is a discretionary decision of the Tribunal to not evict. Moreover, the jurisdiction of the Tribunal to grant relief under the *TPA* only extends to an order for eviction; the arrears order would still exist and be enforceable. If relief were granted

A tenant who is dissatisfied with a decision regarding entitlement to a subsidy may challenge the decision within the procedures established by the Ministry and may have a right to judicial review of the decision (see *Re Webb and Ontario Housing Corporation*).

171. *Re Webb and Ontario Housing Corporation* (1978), 22 O.R. (2d) 257, 93 D.L.R. (3d) 187 (C.A.).

172. In *Barrowcliffe*, *supra* note 96, the Tribunal refused to consider the matter of the timing of the handing in of income information as a factor in the exercise of its equitable discretion under s. 84 of the *TPA*.

173. *Supra* note 100.

with respect to the eviction and the Tribunal did not take the jurisdiction to review the rent subsidy termination the arrears would continue to increase where the landlord refused to reinstate the subsidy.

B. Partial Statutory Exemptions in Sections 5 and 6 of the *TPA*

A Tribunal decision that it has no jurisdiction to inquire into the circumstances of the subsidy revocation is also inconsistent with the framework of partial statutory exemptions. Several Tribunal decisions have made reference to *TPA*, s. 5.¹⁷⁴ While it is clear that many sections of the *TPA* do not apply to social housing and RGI housing,¹⁷⁵ there is nothing in the *TPA* that expressly, or by implication, leads to the conclusion that tenants in RGI units were to be treated differently with respect to eviction applications for arrears of rent. Section 5 sets out the following exemptions for social housing:¹⁷⁶

- ss. 17, 18, 32(1)1, 33, 81(2), 82, 89, 90 (assignment, subletting; unauthorized occupancy)
- ss. 54, 55, 57, 58, 59 (condo conversion, compensation for termination due to repair or renovation, severance)
- ss. 90, 92, 95, 100 to 102 (care homes)
- ss. 108, 114, 116 (mobile homes)
- ss. 121, 123, and 124, (calculation of “lawful rent”)
- ss. 129-139 (rent rules relating to guideline and above guideline increases)
- ss. 142 and 143 (tenant applications for rent reduction for reduction in services or taxes)

In addition, s. 126 (12 month rule) and ss. 127 and 128 (notice of rent increase) do not apply to rental units where the tenant pays rent in an amount geared-to-income due to public funding, where the rent increase is due to an increase in the tenant’s income.¹⁷⁷

174. *Pottinger*, *supra* note 85. See also, *Kitchener Alliance Community Homes Inc. v. Ghafoori* (12 November 2002; Tinker) File No: SWL-43506 (ORHT) where the Tribunal held that “Pursuant to section 5 of the *Tenant Protection Act*, I do not have the jurisdiction to interfere with the calculations of rent subsidies, established by the Ministry of Housing” (at 2).

175. Section 6 provides an exemption for rental units where the tenant pays RGI rent due to public funding, and the unit is *not* one already described in paragraphs 1-3 of s. 5(1). Unlike the s. 5 exemptions, the s. 6 exemptions apply even if the RGI tenant is renting from a private landlord, so long as the subsidy is due to public funding.

176. *TPA*, s. 5(1).

177. *TPA*, ss. 5(2), (3). Thus, where the rent increase is *not* due to an increase in income, the *TPA* applies to social housing providers. Therefore, failure to file income information in a timely manner where there is no increase in income would require the housing provider to increase the rent on 90 days notice. This is, in fact, now the requirement under s. 14(3) of the *SHRA*. However, the requirement to provide notice does not resolve the issue. In several of the cases cited (namely, *Barrowcliffe* and

These sections deal with a number of issues concerning rent, including the amount of rent that can be charged to a tenant and when and how that rent can be increased. Section 5 does not, however, provide a complete exemption from all provisions regarding rent. It does not exempt social housing landlords from having to prove the arrears lawfully owing in an application to evict by satisfying the Tribunal, on a balance of probabilities, that there has been a breach of the tenancy agreement justifying the revocation of the subsidy.

The exemptions mean that the rules regarding changes in rent are for the most part not determined in accordance with the *TPA*, Part VI. The Tribunal's approach seems to be based on the assumption that, if the rent rules under the *TPA* do not apply, there are no rules at all. This is not the case; for social housing, the rent is determined under the *SHRA* and regulations.¹⁷⁸

C. Human Rights Law and Constitutional Values

1. Human Rights Code

The Supreme Court of Canada has repeatedly reiterated the view that human rights legislation has a unique constitutional nature. The Court has recently confirmed that human rights legislation is "of a special nature, not quite constitutional but certainly more than the ordinary, and it is for the courts to seek out its purpose and give it effect".¹⁷⁹

Subsection 2(1) of the Ontario *Human Rights Code* (*Code*)¹⁸⁰ provides that:

Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of the receipt of public assistance.

A rent subsidy is a form of public assistance and recipients are protected from discrimination by the *Code*. A determination that the Tribunal has no authority to consider the merits of a tenant's dispute to an arrears eviction where a rent subsidy has been revoked undermines the security of tenure protection afforded to a group of tenants who are identified by a prohibited ground of discrimination under the *Code*. By failing to exercise its jurisdiction, the Tribunal has interpreted the *TPA* in a manner

Allen), the landlord did provide the 90-day notice, but still was able to argue that the Tribunal had no jurisdiction to question the decision to cancel. The lack of an exemption for notices of increase where there is no increase in income only affects *when* the landlord can raise the rent to market, not *whether* they can. That issue is equally uncertain in all the cases.

178. Simply because the *TPA* does not apply doesn't mean no rules apply. For instance, there is a blanket exemption from the *TPA* for units where the tenant shares a bathroom or kitchen with the owner of the premises under *TPA*, s. 3(i). Though such a tenancy would be exempt from the *TPA*, this would not mean that the landlord was free to do what they wished – there would still be other rules that would determine the legal rights and obligations of the parties with respect to the tenancy, such as the terms of the contract between the parties, and the common law rules regarding tenancies.

179. *B. v. Ontario (Human Rights Commission)* (2002), 294 N.R. 140, [2002] S.C.J. No.67 (S.C.C.) (QL) at para. 44 *per* McLachlin C.J.C. and Gonthier J. citing *Ontario Human Rights Commission v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321.

180. R.S.O. 1990, c. H.19.

that is inconsistent with the tenant's right, under s. 2(1) of the *Code* to equal treatment in accommodation without discrimination based on receipt of social assistance.

The *Code* has primacy over other legislation.¹⁸¹ If the Tribunal is correct in finding that it lacks jurisdiction under the *TPA* to consider the merits of a tenant's dispute where the issue is revocation of a rent subsidy, an appellate court must apply the *Code* if it finds that the interpretation adopted by the Tribunal would result in unequal treatment of persons in receipt of social assistance in respect of their rights under s. 2 to occupancy of accommodation.

2. *Charter of Rights and Freedoms*

The Supreme Court of Canada has affirmed that an interpretation consistent with the values in the *Charter of Rights and Freedoms* (*Charter*) must take preference over an interpretation that would run contrary to those values.¹⁸²

Subsection 15(1) of the *Charter* states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹⁸³

Section 15 is concerned with preventing disadvantages created or perpetuated by the application of the law to persons who are already vulnerable. The purpose of s. 15 has been described as follows:

... to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.¹⁸⁴

The Nova Scotia Court of Appeal has recognized that persons who qualify for public housing are disadvantaged within Canadian society both by virtue of their status as public housing tenants and because of their identification with other prohibited grounds of discrimination, including gender and family status.¹⁸⁵ The Ontario Court of Appeal has recently recognized the receipt of social assistance as an analogous ground of discrimination under s. 15 of the *Charter*.¹⁸⁶ An interpretation that the

181. *Ibid.*, s. 47(2).

182. Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths; 1994) at 322-324; *Hills v. Canada* (Attorney General), [1988] 1 S.C.R. 513, (1988), 48 D.L.R. (4th) 193 at 226-227 (D.L.R.).

183. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15.

184. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 at 23 (D.L.R.).

185. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993) 119 N.S.R. (2d) 91, 101 D.L.R. (4th) 224 (N.S.C.A.) at 233, 234 (D.L.R.).

186. *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481, 212

Tribunal does not possess the jurisdiction under the *TPA* to review a subsidy dispute in an arrears of rent application is inconsistent with a public housing tenant's right to equal benefit of the law without discrimination.

VI. THE PROPER APPROACH FOR THE TRIBUNAL

The approach the Tribunal should adopt is articulated best in *Dunbar*,¹⁸⁷ *Pottinger*¹⁸⁸ and *Spajic*.¹⁸⁹ Where an eviction application for arrears is brought by a landlord after revocation of a rent subsidy, the Tribunal must make a finding as to whether or not rent is "lawfully owing under a the tenancy agreement", and if so, order repayment in a specific amount. The Tribunal must examine the evidence to determine if the landlord has established the grounds for termination relied upon in the application, namely rent arrears. This requires the Tribunal to consider the factual circumstances on which the landlord based its decision to cancel the rent subsidy.

The Tribunal's jurisdiction to determine the lawful rent is implicit in its jurisdiction to resolve disputes regarding the amount of rent to be paid. While a Tribunal may have no jurisdiction to question the nature or existence of the subsidy rules in and of themselves but when a rent subsidy is revoked, the Tribunal does have the jurisdiction to determine whether those rules have been properly applied.¹⁹⁰ The Tribunal must determine, on the procedural and substantive merits, whether a landlord has properly and appropriately revoked a rent subsidy and may determine what the lawful rent the tenant is required to pay in RGI tenancies. As stated by the Tribunal in *York Presbytery v. Plourde*:¹⁹¹

The tenant is entitled to question the landlord's claim, and not be evicted because the landlord hides this decision behind a rent increase, which the tenant cannot pay. The Act does not place the rent increase beyond the authority of the Tribunal to review and finally determine. ... The Tribunal cannot accept "market" or "full" rent because this is easier to determine or has some satisfaction as a penalty for a misdeed or fraud.¹⁹²

In most cases, the determination of the lawful rent by the Tribunal would take place in the context of an application by the landlord under ss. 61 or 86 of the *TPA*. Even

D.L.R. (4th) 633 (C.A.), at 506-508 (O.R.), aff'd (2000), 188 D.L.R. (4th) 52, 134 O.A.C. 324 (Div. Ct.). Leave to appeal *Falkiner* to the S.C.C. was granted on March 20, 2003 at [2002] S.C.C.A. No. 297 (S.C.C.) (QL).

187. *Supra* note 106.

188. *Supra* note 85.

189. *Supra* note 111.

190. There are three sources of rules – the tenancy agreement, which may provide contractual authority to revoke the subsidy, the provincial rules set out in the *SHRA* and any applicable local eligibility rules. While the Tribunal may have no authority to review a decision of a social housing landlord determining *initial* eligibility for RGI assistance as part of an application for an RGI unit under the *SHRA*, the circumstances are quite different where a landlord revokes or varies *existing* RGI assistance and subsequently commences eviction proceedings at the Tribunal.

191. *York Presbytery – United Church Developments v. Plourde* (14 May 2001; Braund) File Nos. TNL-22694 and TNL-24908 (ORHT).

192. *Ibid.*, at 10-11.

though a lease or occupancy agreement must now specify the amount of rent that would be payable if the unit were a market rent as well as the RGI rent,¹⁹³ this does not necessarily make the market rent the lawful rent. The lease or occupancy agreement must state only that the RGI rent is subject to change;¹⁹⁴ the agreement may provide no details as to the manner or time period for proposed rent increase to market rent because these rules are set out in the *SHRA*'s regulations.¹⁹⁵

At this date, it is unclear what impact the *SHRA* may have on the Tribunal's approach to its jurisdiction. Very few cases have directly addressed the application of the *SHRA*.¹⁹⁶ It has been observed that the Tribunal may be even more reluctant to assume jurisdiction in the *SHRA* era, given that rules regarding subsidies which formerly existed only in policy are now codified in regulations.¹⁹⁷ However, there is no basis for the Tribunal to restrict its scope to the interpretation of the *TPA*. The purpose of the *SHRA* is to set out detailed eligibility and occupancy rules concerning, among other things, eligibility for RGI assistance, to allow for more efficient administration of social housing.¹⁹⁸ But the *SHRA* does not provide social housing landlords with the authority to terminate tenancies as that jurisdiction is conferred exclusively on the Tribunal. The *TPA* and the *SHRA* coexist without any inconsistency or conflict.¹⁹⁹ The two statutes deal with different areas of the same subject matter – subsidized tenancies.

The *SHRA* presents new procedurally based arguments to advance in disputes against arrears of rent eviction applications by social housing landlords. If an increase to market rent occurs that is not in accordance with the requirements under the *SHRA* and regulations, then the rent charged to the tenant would be unlawful in the sense that it failed to comply with the *SHRA*. As the *SHRA* applies despite any other Act,²⁰⁰

193. O.Reg. 339/01, s. 22(1) 2.

194. O.Reg. 339/01, s. 21(1) 4.

195. *Barrowcliffe*, *supra* note 96 provides a good example of such a lease provision. However, the lease may contain such provisions by making specific reference to the *SHRA* rules.

196. See *M. F. Arnsby Property Management Ltd. v. Kennedy*, *supra* note 121.

197. See Paul Rapsey, "Social Housing Issues" *CRO Standard Memorandum* (TPAMEM-017; August 2002) at 19-23.

198. One way to view the *SHRA* is as the codification of rules and policy directives that formerly existed in the Local Housing Authority Administration Manual. In *Greater Sudbury Housing Corp. v. Racicot* (7 January 2002; Keleher) File No: NOL-06275 (ORHT), a pre-*SHRA* application based on ceasing to qualify for occupancy, the landlord relied on a policy directive in which former tenants of social housing with outstanding arrears could only be considered for RGI housing if the arrears were paid in full, unless there were extenuating circumstances. In effect, such a policy is now codified in ss. 7(1)(e) and (f) of O.Reg. 298/01. Under the *SHRA*, in the event that the tenants' dispute claimed that no arrears were owing, the Tribunal would be obliged to consider that evidence prior to making a finding that the landlord had established that the tenants had ceased to qualify for occupancy, *i.e.* that the tenants were to be evicted for breach of s. 7(1)(e) of the O.Reg. 298/01.

199. The mere fact that both statutes deal with social housing does not imply that the *SHRA* has, in some way, "occupied the field" of RGI assistance and that the *TPA* and the Tribunal have no role to play. The statutes concern different aspects of the same subject matter and there is no direct conflict between them.

200. The primacy provision, states: (1) This Act applies despite any general or special Act and despite any regulation made under any other Act; (2) In the event of a conflict between this Act and another

it makes sense that the *SHRA* has to be complied with as a precondition to a landlord claiming a specific amount of arrears of rent from an RGI tenant.²⁰¹

On the other hand, if the landlord precisely applies the procedure under the *SHRA*, then the rent charged would presumably be “lawful” rent in terms of the procedural requirements.²⁰² A tenant would, in those circumstances, have to argue the substantive basis of the landlord’s decision and any potential relief from eviction arguments. In *Liszek*,²⁰³ for example, the Tribunal might have inquired as to whether, as a fact, the tenant’s brother had moved into the unit. If the Tribunal had found that there was insufficient evidence to establish the brother’s occupancy then the landlord would have had no basis upon which to revoke the subsidy. There would have been no arrears of rent as the arrears that had been claimed were based on the “market” rent, that would have been payable only where the tenant was at fault.

The analysis by the Manitoba Court of Appeal in *Schoen*²⁰⁴ represents an alternative position. In the event that the Tribunal determines that it has no jurisdiction to deal with the issue of the revocation or variation of a rent subsidy and subsequent arrears of rent, then it is arguable that the Tribunal has no jurisdiction to make an order granting the landlord’s application.²⁰⁵ The issue of what is the lawful rent is a question

Act or a regulation made under another Act, this Act prevails except where otherwise provided in this Act. It should be noted that the *TPA* also has a primacy clause: *SHRA*, s. 156.

201. In *Liszek*, *supra* note 95, the *SHRA* did not apply to the landlord until December 1, 2001, a month after the decision was made to raise the rent to market rent. However, had the *SHRA* applied, there were at least two main procedural flaws on the part of the landlord: (1) there was no notice of the proposed decision and opportunity to comment and (2) there was insufficient notice of rent increase to market rent. In early October 2001, the tenant was notified that the rent would go to market on November 1, 2001 unless the tenant supplied the requested information regarding his brother’s income and occupancy. In essence, the landlord alleged that the tenant had failed to provide information in accordance with s. 10 of the *SHRA*. The landlord’s rent increase was, assuming the *SHRA* applied, clearly in violation of the applicable rent increase provision. Subsection 14(3) requires that the service manager is to cease paying the RGI assistance as of the month immediately following the 90th day after the date the service manager gives the household written notice that the household has ceased to be eligible for RGI assistance. On the other hand, if the landlord had taken the position that there had been an increase in the household income (*i.e.* the income of the brother should now be included), in which case no notice under *TPA*, s. 127 would be required, the rent increase should have been effective the first day of the second month after the decision was made.
202. Further, the scope of any judicial review application might be circumscribed as the *SHRA* sets out a procedural mechanism, if complied with, may satisfy, in some cases, the requirements of natural justice and procedural fairness.
203. *Supra* note 95.
204. *Supra* note 115.
205. In *M.F. Arnaby v. Watson* (29 November 2001; Gascoyne) File No: SWL-30994-SA (ORHT), the Tribunal applied *Schoen*. The tenant’s rent was increased to market rent for two months for failure to provide required information. The Tribunal disagreed that s. 61(1) provided the statutory authority to review the circumstances behind the temporary revocation of the subsidy, stating (at 7-8):

It really comes down to the question of whether this Tribunal has been delegated the responsibility of ensuring compliance with the operating agreement between the service provider and the funding provider. There is nothing in the *Tenant Protection Act*, which suggests that this Tribunal has been given the authority to interpret the federal and provincial cost sharing

of law where the tenant disputes the amount claimed on the grounds that the landlord improperly or illegally charged a market rent. This question must necessarily be addressed prior to any order for any arrears of rent and eviction. If the *Schoen* approach is correct in Ontario, it may be that an application by the landlord to the Superior Court of Justice for a declaratory order that the subsidy is properly cancelled is required as a precondition to a successful application to the Tribunal based on market rent.²⁰⁶

Such an approach has similar disadvantages to the judicial review application. It is expensive, complex, time consuming, and inconsistent with the central purpose of the *TPA* to create a fast, fair, and efficient process. While there may be no express provision granting the Tribunal the jurisdiction to engage in an analysis of RGI assistance matters, neither is there an express provision prohibiting such jurisdiction. Resort must therefore be had to the intent and purpose of the *TPA*, which is to resolve disputes between landlord and tenants and to provide protection to tenant's security of tenure. It would be incongruous with the remedial purpose of the *TPA* if one specific type of eviction application – arrears of market rent based on a revocation of RGI assistance – was immune from Tribunal adjudication. If the Tribunal lacks the jurisdiction to examine the landlord's internal, preliminary decision to revoke a rent subsidy then this would create an extraordinary departure from the basic principle that an applicant/landlord at a hearing before the Tribunal bears the burden of demonstrating the basis for the order sought.²⁰⁷ There is nothing in the *TPA* nor the *SHRA* that indicates such an outcome was intended.

statutes and the agreements that must be reviewed. The mere fact that Tribunal has been given the jurisdiction to order a tenant to pay the "rent lawfully owing under the tenancy agreement" or which otherwise be payable had the tenant not misrepresented their income is insufficient for me to reach the conclusion urged by the Tenant. The role of ensuring there has been proper compliance with the Operating Agreement by the Landlord in the calculation of the rent appears to have been assigned to:

an internal review under the provisions of the *Social Housing Reform Act, 2000*, where that legislation is applicable, or
 where the *Social Housing Reform Act, 2000*, is not applicable, the Operating Agreement, if such a review process has been developed; or
 to the courts.

206. In *Schoen*, *supra* note 115, the Court of Appeal concluded (at 264-65):

I would refer the matter back to the Commission for further consideration with an order directing that such further consideration be adjourned until such time as one or both of the parties have applied for and obtained a declaratory order from the Court of Queen's Bench with respect to the meaning and effect of the relevant statutes and agreements with respect to the establishment of rent for subsidized housing.

Furthermore, a denial by the Tribunal of such an adjournment request by the tenant to bring such an application may, in itself, constitute a breach of the rules of natural justice and require recourse to a judicial review application. This reinforces the impractical litigation that might have to be made as a result of the Tribunal failure to assume its proper jurisdiction.

207. In contrast with *Liszek*, *supra* note 95, in which the Tribunal held that it had "no jurisdiction to enquire into the tenant's entitlement to a rent subsidy" (at 1). Rather, it is the landlord who must demonstrate their entitlement to an eviction based on the ground relied upon.

VII. A LAW REFORM ALTERNATIVE

The argument that the Tribunal has the jurisdiction to determine the lawful rent in an RGI situation is based on the law as it currently stands. However, the question of whether the ORHT is the best forum to resolve those disputes is another matter altogether. It is also apparent that, for some Tribunal members, should one of the appeals currently before the courts expressly find that the Tribunal does have to determine the lawful subsidized rent owing, such jurisdiction will not be welcomed.

It is true that by their nature disputes over subsidized rents may be more complex than the majority of the arrears cases heard by the Tribunal each day. This is demonstrated by the fact that the Tribunal scheduling procedure generally allots only five minutes for each arrears of rent hearing.²⁰⁸ Although in practice Tribunal members may take the time necessary to ensure a proper hearing of any matter that comes before them, the additional time required to deal with a complicated issue regarding a rent subsidy cancellation will inevitably cause other matters to be delayed.

This result could be partially addressed by adjusting scheduling procedures, but the underlying problem remains that Tribunal members in general are unfamiliar with the complex regulations that determine eligibility for and calculation of rent subsidies in social housing. Of course, it is possible for this expertise to develop should the Tribunal accept the jurisdiction to deal with such matters. However, there already exists an independent adjudicative tribunal who regularly deals with these issues, namely the Social Benefits Tribunal (SBT).

Eligibility for RGI assistance is based on income and asset levels as set out in detail in O.Reg. 298/01. These criteria are essentially the same as the eligibility criteria in the regulations under social assistance legislation, the *OWA* and the *ODSPA*. Since 1998, the SBT²⁰⁹ has developed expertise by resolving disputes over the interpretation of these regulations between recipients and the appropriate government body, whether the administrator of OW or the director of ODSP. The regulatory criteria by which a housing provider may terminate a subsidy are essentially the same by which the administrator or director may cancel social assistance, including provision for an internal review of decisions. The key difference is that in social assistance decisions, a recipient has an express statutory right of appeal. Accordingly, the SBT may be the most appropriate body to be determining whether or not an RGI subsidy has been properly terminated.

There are procedural and resource issues that would have to be addressed if the SBT were to be given responsibility for dealing with appeals of subsidy determinations. It may be eight months or longer between an appeal being filed with the SBT and a hearing being held. If a tenant was given a right of appeal to the SBT from the termination of his or her RGI assistance, the SBT would most certainly require

208. This is, of course, for scheduling purposes only, and is based on the assumption that many matters will settle. Nonetheless, there may well be 15 or more matters actually heard in any 2 1/2 hour hearing block before the Tribunal.

209. Prior to the SBT, the Social Assistance Review Board (SARB) performed an identical function.

additional resources to deal with the extra caseload and there would likely be pressure to create a more expeditious process. An appeal of a decision under the *OWA* does not mean another person is denied or delayed assistance while the appeal is heard. However, in the social housing context, extensive delays in resolving those disputes where a housing provider is justified in trying to evict a tenant would add to the existing time spent on the waiting list by other applicants for social housing.

To have such matters heard by the SBT would require a legislative amendment to the *SHRA* and changes to the internal structure of that SBT. However, given the expertise of the SBT, it is worth considering that disputes regarding eligibility for a rent subsidy should be heard by the same Tribunal who has the expertise and experience in dealing with other social benefits.